# THE CONVEYANCER
AND
# PROPERTY LAWYER

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## CONVEYANCER'S NOTEBOOK

### CONVEYANCING MANNERS

In recent issues of the *Law Society's Gazette* there has been some correspondence on the subject of copy documents supplied which discloses an unhappy ignorance on the part of some practitioners as to their rights. Originally, if one solicitor drafted a document he sent it, without a copy, to the solicitor on the other side who made his own copy, the original document passing to and fro with amendments in different coloured inks until it returned home to the original draftsman. With the introduction of the typewriter it became the practice, as a matter of courtesy, to supply the other solicitor with a copy for his own use. That this copy is purely a courtesy copy is beyond all doubt. The solicitor who made the copy was never entitled to charge his client for it; conversely, the solicitor receiving it was almost certainly entitled to charge for it as though he made it himself. (This question of costs is unlikely to arise directly today.) Until recently, it was unusual to supply a copy of a plan for the other solicitor, though often today where the original plan is reproduced photographically a second copy is often run off as a matter of convenience. It may be observed that the historical courtesy of the extra copy is still often acknowledged, as where a solicitor writes: " I thank you for your letter of the , enclosing draft contract together with a copy for my use, *for which I am obliged.*"

Sometimes the original courtesy is abused. A solicitor may, quite wrongly, retain the top copy and use it as an engrossment to be signed by his client, leaving the original draftsman with a carbon

copy and the obligation of making his own engrossment. Indeed, in the case of lithographed contracts we have known solicitors keep one copy as a draft and use the other as an engrossment. It is, of course, common for a draft transfer of registered land to be used as an engrossment but this is quite a different matter as the original draftsman's work is cut down and it is usually so used at his specific request.

The trouble leading to the correspondence in the *Law Society's Gazette* seems to have originated in the use of printed forms. The complaint is that a draft is sent duly filled up and only a print supplied for the other solicitor, and one correspondent went so far as to say that in such circumstances he retaliated by returning the blank form. It is unnecessary to comment on such conduct, but does it not show that the practice of conveyancing is not being properly taught to articled clerks by their principals? We have always thought it a little mean where building societies' solicitors fail to supply a copy of the mortgage for the mortgagor's solicitor. It is appreciated that these prints cost money to produce, but the building societies' solicitors can always add the item to their disbursements. It is one thing to demur at receiving no print at all, but quite another to object to filling up a print supplied as a matter of courtesy for one's own use. The mere filling up of the form will ensure at any rate that the form is checked.

There is one case where a purchaser's solicitor may be in difficulties. If the vendor's solicitor uses a local Law Society's form of contract, the purchaser's solicitor in another locality may not have the form available for the engrossment. A request for a further copy coupled with an offer of payment nearly always produces a copy but without payment.

Another decline in practice is to be observed in the amendment of drafts. A amends in red, B in green and then A in purple: if neither A nor B shows who made the amendments with dates the order of the amendments may be difficult to follow, if the draft has to be turned up in later years. We say nothing about preliminary inquiries, which were dealt with in the last issue of the *Conveyancer*.[1]

It would be quite wrong if we were to leave the impression that we thought that there had been a serious drop in standards. On the contrary, our general impression is that most practitioners, despite heavy pressure of work, do whatever is possible to ease the task of their fellow practitioners, but sometimes articled clerks are not being taught the niceties of practice by their principals or their law schools. Manners must adapt themselves to changing

[1] *Ante*, p. 336.

techniques, but it would be disastrous if technical agility were to become synonymous with boorishness.

### Land Registry Notice

We have received the following notice from the Land Registry:

" 1. Further to relieve congestion in H.M. Land Registry, Lincoln's Inn Fields, the registers, filed plans and index maps relating to the County of Yorkshire including County Boroughs are being removed to Government Buildings, Chalfont Drive, Nottingham, on September 4, 1961, where as from that date the registration of title work in this area will be done.

" 2. In order to save time and transport, all applications for registration, searches, etc., affecting titles in Yorkshire should as from September 4 be sent direct to the Nottingham Sub-Office which already deals with registrations in the City and County of Leicester, the Counties of Derbyshire, Warwickshire, Staffordshire, Worcestershire and Nottinghamshire.

" 3. Personal searches of the registers and index maps may be made at Nottingham but where it is desired to inspect these records in London they will be made available at Lincoln's Inn Fields at short notice.

" 4. The postal address of the Nottingham Sub-Office is:

H.M. Land Registry,
Chalfont Drive,
Nottingham.
Telephone No. 77711.

*August 8, 1961.*"

# TRUSTEE INVESTMENTS ACT, 1961

By Alec Samuels, Barrister-at-Law

" In fact, if it were possible now to ascertain the opinions of these people [settlors] who have passed away, I think it is very probable not only that they would approve of what we are doing, but they might reproach us for not having done it a good deal sooner." [1] The Act is designed to give trustees wider powers of investment while at the same time preserving security for the beneficiaries.

## Division of the Trust Fund

The Act [2] permits but does not oblige a trustee to divide the trust fund into two parts, the " narrower-range part " and the " wider-range part." These parts must be equal in value at the time of the division, and the division is final and irrevocable. No property may be transferred from one part to the other unless there is made at the same time a " compensating transfer " which is a transfer in the opposite direction of property of equal value (s. 2 (1)). Where, following the division, some wider-range investments appear in the narrower-range part those investments must be transferred to the wider-range part and balanced with a compensating transfer, or reinvested in narrower-range investments as soon as may be (s. 2 (2)). But narrower-range investments may always appear in the wider-range part.

There is no positive duty upon a trustee to seek professional advice for the purpose of valuing the trust fund before making a division, but by way of encouragement if a trustee does obtain, from a person reasonably believed to be qualified to make it, a valuation in writing for the purposes of a division, that valuation is conclusive evidence that the division was duly made (s. 5). If a trustee makes a division without obtaining an expert valuation he runs the risk of challenge. The section presumably will not protect the trustee who provides inaccurate or incomplete information to the valuer, whether by negligence or fraud, *e.g.*, by suppressing information of the existence of certain securities forming part of the trust fund.

[1] Earl Dundee, 226 H.L.Deb. 923, November 28, 1960.

[2] For the Government's original proposals see the White Paper on " Powers of Investment of Trustees in Great Britain." 1959 (Cmnd. 915).

### Property Accruing

Property accruing to a trust fund after the division must be treated as belonging to that part from which it accrued to the trustee as owner or former owner of property comprised in either part of the fund. This is the particular case. It covers the case of a bonus or scrip issue, and the case of a trustee mortgagee foreclosing. The " owner " is the legal owner, namely the trustee (s. 2 (3) (*a*)).

In the general case of outside additions to the fund the trustee must secure that the two parts are increased by the same amount, either by apportioning the accruing property equally, or if unequally, by transferring property by means of a compensating balancing transfer from one part to the other (s. 2 (3) (*b*)). Thus a certain flexibility is preserved because it may not be appropriate to divide the accruing property as it stands as an equal amount to each side. The property might be indivisible, or it might be inappropriate for allocation to the narrower-range part, being a wider-range investment. Therefore there may be a switching of property from one side to the other to take account of that sort of contingency. But the end result must be that there is an increase to each part of equal value.

Suppose that by virtue of holding ordinary shares a trustee is offered a " rights issue " of a further 500 shares in a company. If the new shares are offered at £1 each and the rights are assessed by the market to be worth 5s. a share, then the trustee has two alternatives. He can take up all the new shares. If he has no spare cash available in the wider-range part he will have to realise part of his wider-range investments in order to find the cash to purchase the new shares. The 500 shares when purchased will thus be treated as an investment in the wider-range part of the fund, even though the shares may be worth more than is paid for them. Alternatively the trustee can sell 400 of the 500 rights he has secured, realising £100 which he can use to take up the balance of the 100 shares. These 100 shares rank as an accrual to the fund, and must be apportioned equally, or with the help of a compensating transfer, since the consideration for them did not come from property invested in, or from proceeds of property invested in either of the parts of the fund (s. 2 (3)).

### Withdrawals

Where property falls to be taken out of the trust fund, the trustee has an unfettered discretion under the Act to withdraw from either or both of the two parts of a divided trust fund (s. 2 (4)). The Act does not pursue the logic of the 50 : 50 rule to withdrawals and has sacrificed consistency to simplicity. Withdrawal means taking

property out of the fund altogether, not just realising an investment for the purpose of reinvesting.

The significance of this subsection is far-reaching, for it means that a trustee can gradually and eventually change the whole character of a trust fund. Although all accruals must be divided 50 : 50, he can consistently withdraw from the narrower-range part, so that that part is run down to the advantage of the wider-range part, thereby gradually increasing the equity proportion of the whole trust fund. This will be particularly likely to happen in the case of pension funds which are subject to constant withdrawals. There is, of course, the overriding duty on the trustee to exercise his discretion in a prudent business-like manner.

### MODIFICATION OF THE 50:50 PRINCIPLE

Despite the Government's insistence on the "fundamental" 50:50 principle the Treasury has power by order, subject to affirmative resolution of both Houses of Parliament, to modify the 50:50 proportion up to a ceiling of 25:75 in favour of the wider-range part (s. 13 (1)). A fund which is being divided for the first time may be divided in the proportion prescribed for the time being by any Treasury order in force; a fund which has already been divided may be divided anew, once only, into the new prescribed proportion, and the valuation of the fund for the new division must be made at the time of any proposed new division (s. 13 (2)).

The new ceiling proportion of 25:75 may be reached in stages by Treasury order, *e.g.*, starting at 40:60, then going to 35:65, and ending up with 25:75. The Treasury may increase the proportion of the wider-range part, but may not reduce it. It is unlikely that this section will be used in the near future.[3]

### RELATIONSHIP BETWEEN THE ACT AND OTHER POWERS OF INVESTMENT

The powers contained in the Act are in addition to and not in derogation from any power conferred otherwise than by the Act; a power of investment derived from the trust instrument is known as a "special power" (s. 3 (1)). A special power may also be derived from statute, as in the case of some local authorities which have in recent years obtained powers under private Acts to invest up to half of their funds in equities, or as a result of an application for an enlarged power of investment under the Variation of Trusts Act, 1958.

[3] Sir Jocelyn Simon, S.-G., House of Commons, July 7, 1961, and Mr. A. Barber, Economic Secretary to the Treasury, House of Commons, July 12, 1961.

### Special-Range Property in a Separate Fund

The basic principle in the Act is that any property invested as a result of the exercise of a special power is known as " special-range property " and carried to a separate fund (s. 3 (3) and the Second and Third Schedules) if the trustee wishes to avail himself of the additional powers contained in the Act. Thus in such circumstances a trustee will now have to divide the fund into three parts, namely the special-range part, comprising property invested as the result of the exercise of a special power, the narrower-range part, comprising one half of the remainder, invested in gilt-edged, and the wider-ranged part, comprising the other half of the remainder invested in equities.

Examples of a special power include a power to postpone the conversion of unauthorised into authorised securities, a power to invest in a particular company or class of companies, or a power to invest in land. Settled land and land held upon trust for sale are special-range property. A trustee empowered to postpone the sale of a family business comprised in the trust property would hold those business assets as special-range property.

### Accruals and Conversions to and from the Special-Range Property

Any property accruing to the trust fund which is special-range property must be placed to the special-range part, and the same applies to property already in the trust fund which is converted into special-range property (Second Schedule, para. 2). Whereas rights issues arising from securities in the narrower-range and wider-range parts are treated as a new investment and divided between the two parts, rights issues arising from special-range securities become special-range securities (s. 3 (3)).

Where property is taken out of a trust fund so as to form a separate fund of a special-range property and the trust fund has been previously divided under the Act, the trustee may take property from the narrower-range part and the wider-range part either equally, or in proportion to the value of the two parts of the fund, or some intermediate proportion (s. 4 (3)). For example, a fund of £10,000 is divided equally under the Act into the narrower-range part and the wider-range part. The narrower-range part has remained worth £5,000, whereas the wider-range part has increased in value to £7,500. The trustee now forms a separate fund of special-range property worth £5,000. He may either take £2,500 from each of the two parts, or £2,000 from the narrower-range part

and £3,000 from the wider-range part (proportion 2:3) or £2,000–£2,500 from the narrower-range part and the rest to make up £5,000 from the wider-range part (any intermediate proportion between 1:1 and 2:3).

When the conversion is the other way, *i.e.*, special-range property is converted into ordinary trust property, if the fund has been divided in accordance with the Act the converted special-range property must be placed to the narrower-range part and the wider-range part equally, or if unequally, then with a balancing or compensating transfer (Second Schedule, para. 3). For example, trustees have purchased a house under a power in the trust instrument to purchase land. The house is carried to a separate fund as special-range property. If the house is sold, and no further house is required, the proceeds are carried to the narrower-range part and wider-range part equally. If subsequently the trustees desire to purchase another house, they withdraw the purchase price from the two parts and reconstitute the separate fund of special-range property with the newly acquired house.

### Restriction on Use of Special Power and Power Under the Act

There is one particular category of case in which the trustee is not permitted to utilise both a special power and the additional powers conferred by the Act. Where during the ten years ending with the passing of the Act the court or Parliament has conferred or varied a special power, by reference to that particular trust, the trustee cannot utilise the Act to make or retain any wider-range investment (s. 3 (4) and Third Schedule). The reason for this restriction is that a trustee is thereby precluded from obtaining an unwarranted accumulation of powers. When the courts or Parliament have recently considered the circumstances of a particular trust it was thought to be unreasonable to allow the trustee to go beyond the clear decision of either the courts or Parliament to acquire even more power. For example, suppose that in 1960 the trustees had applied under the Variation of Trusts Act, 1958, for a variation of the trust by way of enlargement of the power of investment, and that the court had granted a power to invest up to 50 per cent. of the fund in equities. But for section 3 (4) it would have been possible for the trustees not only to have invested 50 per cent. in equities, as the court had decided was appropriate, but also to have divided the other 50 per cent. of the fund under the Act and so invest a further 25 per cent. in equities, thus making 75 per cent. in all. Local authorities which have promoted private Acts in recent

years to obtain wider powers of investment will be caught by this restriction.

### Manner of Investment

The manner of investment is set out in the First Schedule. Part I comprises narrower-range investments not requiring advice, and includes Defence bonds, National Savings Certificates and Ulster Savings Certificates, deposits in the Post Office Savings Bank, ordinary deposits in a trustee savings bank and deposits in a bank which sufficiently corresponds with ordinary deposits in a trustee savings bank and holds a certificate to this effect from the Treasury under the Finance Act, 1956, s. 9 (3) as amended by the Trustee Savings Bank Act, 1958, s. 3 (7), (8). Only the Birmingham Municipal Bank so far comes within this description.[4]

Part II sets out the narrower-range investments requiring advice, in effect all fixed interest stocks issued in U.K. and having a Stock Exchange quotation. It includes all the old trustee securities under the Trustee Act, 1925, s. 1 (now repealed), with some newcomers, such as fixed interest securities of local and public authorities in the Commonwealth as well as the U.K., fixed interest U.K. securities of the International Bank for Reconstruction and Development, debentures in U.K. companies conforming to certain conditions, and trustee savings banks. Fixed interest securities issued in London by the government of a Commonwealth country continue to rank as trustee securities; also irredeemable and long-dated securities, such as 3½ per cent. War Loan.

South African securities are now unauthorised securities, for the twelve month standstill under the Republic of South Africa (Temporary Provisions) Act, 1961, has been impliedly repealed to this extent. But by the Trustee Act, 1925, s. 4, a trustee may retain securities which have ceased to be authorised securities, in which case he must transfer them to the wider-range part. Alternatively a trustee can sell and reinvest the proceeds.

Part III consists of wider-range investments, namely:

(1) Securities issued in the U.K. by a company incorporated in the U.K.

(2) Shares in a building society designated under the House Purchase and Housing Act, 1959, s. 1. Thus deposits in a designated building society are narrower-range investments and shares in a designated building society are wider-range investments. There is no financial limit in either case.

4 Birmingham Municipal Bank Order, 1958 (S.I. 1958, No. 923 as amended by S.I. 1959, No. 300).

(3) Unit trusts, including investments trusts, provided that they have been declared authorised unit trusts schemes by order of the Board of Trade under the Prevention of Fraud (Investments) Act, 1958, s. 17. Orders by the Board of Trade ensure that the management does not make too much money out of the unit trust.

The Government may by Order in Council extend the powers of investment conferred by the Act by adding to the list of investments which are permitted for both the narrower-range part and the wider-range part of the fund, subject to the negative resolution procedure in either House of Parliament (s. 12).

### Financial Soundness of Companies

Part IV of the First Schedule provides that the shares and debentures in the wider-range must be sterling securities and quoted on a recognised Stock Exchange within the meaning of the Prevention of Fraud (Investments) Act, 1958, s. 26, namely the Stock Exchange, London, or a body of persons declared by an order of the Board of Trade for the time being in force to be a recognised stock exchange for the purposes of that Act, they must be fully paid up, the company must have £1m. or more issued and paid up share capital, and must in the five years immediately preceding the calendar year in which the investment is made have paid *a* dividend (however small) on all the ordinary shares issued by the company, excluding any shares issued after the dividend was declared. There are believed to be about a thousand qualified companies now in existence.

### Take-over of Companies

A company which was formed to take over the business of another company is deemed to have paid a dividend in any year in which that other company paid a dividend (First Schedule, Part IV, para. 3).

### Diversification

In the exercise of his powers of investment a trustee must have regard to the need for diversification, " in so far as is appropriate to the circumstances of the trust " (s. 6 (1) (*a*) ); there appears to be no duty to diversify where to do so would be unnecessary or impracticable, as in the case of a very small trust. A trustee must consider the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description. Therefore he must first consider the need for selecting different types or descriptions of investment, and then the need for diversifying within that type or description. The

diversification requirement is intended to be a codification of the duty resting on all trustees before the Act.

But what is the meaning of diversification? Is it sufficient to invest in two companies? Suppose a trustee invests 98 per cent. of the wider-range part of the trust fund in company A, 1 per cent. in company B, and 1 per cent. in company C? Suppose the whole of the wider-range part is invested in one unit or investment trust? On the one hand it may be argued that indirectly there is a well-ordered diverse investment since there is a portfolio of investment in many enterprises; but it may also be argued that the investment is directly channelled through one manager or set of managers and is therefore not diverse.

### Duty to Divide?

The Act permits narrower-range investments to appear in the wider-range part, since a trustee can always invest any property in his hands in narrower-range investments (s. 1 (1)) although the converse does not apply. Does this mean that a trustee can indolently or cautiously refuse to divide the fund, or leave both parts of a divided fund in narrower-range investments? Can a trustee ever be in breach of trust for failing to exercise a power? Does the duty to consider diversification connote the balancing of narrower-range and wider-range investments? It is tentatively suggested that if a trustee refuses to divide the fund, or divides the fund and invests wholly or mainly in narrower-range investments, without being able to show some good reason for doing so, his conduct may amount to a breach of trust. In view of the increased possibilities now open to a trustee it may be that a much more active duty is now placed upon him. Of course, a trustee may be justified in saying that he wants to keep most of the fund, including the wider-range part, in gilt-edged securities which he can realise immediately at a value which he can anticipate. Longer-dated and undated fixed interest investments are now yielding 5–6 per cent. and equities often 3–4 per cent. so that a transfer to equities might involve a loss of income. If, for example, a trust fund of £5,000 were held on trust for a widow for life with remainder to the children of the settlor, and the fund were entirely invested in long-dated Government securities standing in the market at below par value and yielding 6 per cent., and the circumstances were such that the need for income for the widow was the prime consideration, those matters would have to be taken into account and would limit the extent to which it might otherwise be desirable to diversify the investments, since such a policy might lead to a considerable fall in income. Similarly, in the case of a very small trust of £100, investment of £50 in gilt-edged

securities and £50 in one industrial company would be appropriate. Equities producing 6 per cent. may often have a high risk element which might render them inadvisable, despite the safeguards laid down (First Schedule, Part IV). It has been suggested that trustees holding growth equities will need to purchase gilt-edged securities to maintain the income of the trust fund. Many trustees may find themselves torn between the conflicting pressures of beneficiaries interested in income urging investment in the narrower-range part and of beneficiaries interested in capital urging investment in the wider-range part.

### Advice

Before exercising any power to invest a trustee must obtain and consider proper advice in writing on the question whether the investment is satisfactory (s. 6 (2), (5) ), and proper advice is defined as the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial matters; and such advice may be given by a person notwithstanding that he gives it in the course of his employment as an officer or servant (s. 6 (4) ). The White Paper of December 1959 [5] spoke of " a competent professional adviser such as a stockbroker, accountant, or bank manager " [6] but the adviser is not now so described, so that many solicitors may be qualified to give " proper advice " within the meaning of the Act. It has been suggested that a letter of approval from a member of the Stock Exchange would be a useful safeguard over an " expert." [7] The cost of advice, where it is not represented by broker's commission, must presumably be borne by the income of the fund, although the advice may be directed exclusively towards methods of benefiting the capital.[8]

Any prudent trustee is likely to obtain sound expert or professional advice before embarking upon an investment, but is it necessary to impose an obligation, often involving considerable trouble and expense, to seek written advice every time he invests, even if it be £1 and even if it be in narrower-range investments, particularly when the obligation is only to consider and not necessarily to follow the advice? It is true that the trust fund as a whole is now more likely to have the benefit of expert advice. Gilt-edged securities are falling and prior advice before investing in them may be very useful. But it seems to be an exceedingly rigid safeguard, and one likely to involve the smaller trusts in considerable expense.

[5] Cmnd. 915.
[6] *Ibid.* para. 5 (3).
[7] *Observer*, July 30, 1961.
[8] See letters to *The Times*, August 12 and 19, 1961.

Can a trustee repose blind faith in his advisers? Can he accept and follow advice offered without any further inquiry or reflection? Can he follow the advice against his own better judgment, even perhaps where he has reason to believe the investment to be unwise? It would seem that although prima facie a trustee would have a good defence if he could show that he followed expert advice,[9] and one of the purposes of the advice provisions is to protect the trustee as much as the beneficiary, nevertheless he might still be liable for breach of trust if it could be shown that he was guilty of wilful default in that he was dishonest or utterly reckless or followed the advice when he knew from reasonably reliable information in his hands that the advice was not sound. His duty is to " consider " the advice and then use his judgment. His reasons for not following written advice would be very relevant to his defence in any proceedings for breach of trust. If a trustee fails to obtain advice at all it would appear that he will not easily be able to persuade the court that he has acted honestly and reasonably, and ought fairly to be excused,[10] in view of the mandatory nature of the requirement to obtain advice (s. 6 (2) ).

### Review of Investment

A trustee who retains any investment made under the Act must determine " at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain and consider advice " (s. 6 (3) ). A trustee must look at the state of investment and determine from time to time whether he should " count the investments," and in doing so he may alter any previous determination. It is not necessary to fix in advance the time interval before the next review. A trustee must however, from time to time give his mind to what is included in his portfolio, but there is no reason why he should not review again earlier or later than he had originally intended. At any rate the trustee cannot simply invest in equities and " then like Sleeping Beauty go to sleep and forget about them, hoping that the beautiful take-over prince will come and rescue him." [11]

### Investment in Mortgages

Investment in mortgages of freehold property in England and Wales or Northern Ireland and of leasehold property in those countries of which the unexpired term at the time of investment is not

9 *Shaw* v. *Cates* [1909] 1 Ch. 389; *Palmer* v. *Emerson* [1911] 1 Ch. 758; *Re Solomon* [1912] 1 Ch. 261, decisions on Trustee Act, 1893, s. 8, now Trustee Act, 1925, s. 8.

10 Trustee Act, 1925, s. 61.

11 Mr. Denzil Freeth, House of Commons, January 26, 1961.

less than sixty years (hitherto 200 years) and in loans on heritable security in Scotland remain as narrower-range investments (First Schedule, Part II, para. 13). There remains in force the Trustee Act, 1925, s. 8, which protects a trustee provided that in making the loan he was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and that the amount of the loan did not exceed two third parts of the value of the property as stated in the report; and that the loan was made under the advice of the surveyor or valuer as expressed in the report.

Thus in investing in real securities a trustee must now seek advice twice. First, he must obtain written advice from an expert in financial matters on the suitability of mortgages in general (s. 6 (7) ), and then, secondly, he must obtain written positive advice on the suitability of the particular loan from an able practical surveyor. One would have thought that general advice about mortgages was of little value, and that the requirement of positive advice on a particular property should be adequate. It is unlikely that a trustee will find an adviser who is both an expert in financial matters and also an expert in valuation.

### Purchase of Land as an Investment

The Act gives no power to invest in land. The position remains as it was—*Re Wragg*.[12] This omission is surprising and has been strongly criticised.[13] The Government's view was that if a settlor wished the trustee to have the power to invest in land he would have said so.

### Application to Vary a Trust under the Variation of Trusts Act, 1958

Existing powers of the court to vary a trust are expressly left untouched (s. 15).

The practice of the court has been to give more liberal powers than those prescribed by the Act. In future the court may be reluctant to accede to applications for wider investment powers. But there seems no reason why, upon hearing evidence of the circumstances of any particular trust, the court may not feel that it can properly and safely authorise the investment of a higher percentage

[12] [1919] 2 Ch. 58.
[13] Notably in 104 S.J. 184.

of the trust fund in equities. But probably there will have to be some convincing reason shown why the powers under the Act are inadequate.

### Scheme or Arrangement

The Trustee Act, 1925, s. 10 (3), which enables trustees to concur in any scheme or arrangement for the amalgamation of a company in which they hold securities with another company, with power to accept securities in the second company, has been extended to cover a scheme whereby the capital of an existing company is to be acquired by a holding company, which issues shares to shareholders in exchange for their holdings, and also covers the scheme whereby only so many of the securities are taken over as is sufficient to gain control. Thus *Re Walker's Settlement* [14] is reversed (s. 9 (1) ).

For the avoidance of doubt, the Trustee Act, 1925, s. 10 (4) is amended so as to make it quite plain that trustees may retain any shares which they have been enabled to take up as a result of exercising a preferential right to subscribe (s. 9 (2) ).

### Local Authority Investment Schemes

Local authorities may join together for the purpose of pooling funds for investment, without in substance extending the scope of their powers to invest (s. 11). This provision is designed particularly to assist the smaller local authorities. Local authorities are forming a new unit trust to be known as the Local Authorities' Mutual Investment Trust (" Lamit "). At present local authorities in England and Wales have £500m. invested of which about £450m. is from their superannuation funds. New money is being added at the rate of £40m. a year. It is planned to invest in up to 150 widely diversified companies.

### Express Investment Clauses

The purpose of the Trustee Act, 1925, was not so much to protect a beneficiary's trust fund as to protect a trustee from proceedings by a beneficiary in the event of some misfortune befalling the trust. The purpose of the new Act is to make things easier for a trustee of an old trust fund for it applies to all such trusts in existence at the time of the Act whether a contrary intention appears or not. But a contrary intention appearing in a trust instrument coming into operation after the Act will displace the Act (s. 1 (3) ), and the then remedy will be an application to the court under the Variation of Trusts Act, 1958.

[14] [1935] Ch. 567.

# SPLIT LEASES

By Bernard Rudden, m.a., Solicitor

We are all sadly familiar with the results of the present-day housing scramble. As the population grows in size and wealth more and more people require their own, separate, accommodation. To satisfy their needs large estates are sliced into building plots, large houses diced into flats; the Space Age, in this respect, is hardly spacious. If the unit which is to be divided is held on lease there are two ways of effecting a severance. The most common is the grant of an under-lease; the transaction may be cumbersome, but its legal effect is reasonably clear. Sometimes, however, part of the property is assigned for the remainder of the term comprised in the lease under which the whole is held. A precedent for such a disposition appeared in a recent issue of this journal.[1] The purpose of the present article is to outline some of the difficulties and uncertainties which beset this method. In general, the observations apply as well to registered as to unregistered leases; mention will be made in the footnotes of any differences which occur.

The sale of flats appears to occasion most transactions of this nature,[2] but, for the sake of clarity, the following situation will be used as an example. The landlord has let two houses—Blackacre and Whiteacre—to the lessee. A single lease is given, in the form required by law. It reserves an undivided rent, imposes repairing covenants and covenants restrictive of user, and contains a proviso for re-entry on non-payment of the rent or breach of any covenant. Assignment or under-lease of the property is not forbidden. The lessee assigns Blackacre to A for the remainder of the term. There is no question of a joint tenancy between them—the lease is split as regards the two distinct parcels, the rent due to the landlord is apportioned (without his consent), and the statutory cross-covenants and powers are implied.[3] This is the basic situation; but it is possible that, at some time in the future, the lessee will assign Whiteacre, or that he, or some assignee from him, will grant an under-lease.

1 (1961) 25 *Conveyancer*, Form 6, at p. 677.
2 See (1960) 24 *Conveyancer*, at p. 492.
3 Law of Property Act, 1925, ss. 77 (1) (D), 190: Land Registration Act, 1925, s. 24 (2).

The main questions which arise for consideration relate to:

1. The landlord's rights—
   (a) against the lessee;
   (b) against an assignee of part.
2. Assignee's rights—
   (a) against the lessee;
   (b) against an assignee from the lessee;
   (c) against an under-lessee of either.

## 1. The Landlord's Rights

### (a) Against the lessee

The grant of a lease involves the creation of proprietary and contractual relations. The latter affect the lessee as long as the term subsists, and no disposition by him can affect that liability.[4] The fact that the landlord has acknowledged such a disposition by, say, accepting rent from an assignee is irrelevant [5]; and it makes no difference that part only of the demised premises has been assigned.[6] " The point," said Lord Mansfield, " is too well settled to bear an argument." [7] Thus the landlord has his action for all the rent and for damages in case of failure to perform or observe the covenants. Further, his right of re-entry would appear to enure, as against the lessee, for a breach of any covenant, including those which are merely personal. This, as will be shown, may have disturbing implications for an assignee of Blackacre when the original lessee is still in possession of Whiteacre.

### (b) Against an assignee of part

It is not easy to fit the split lease into the traditional conceptual framework of land law; and this difficulty is at once a cause and a result of the uncertainty which lies at the heart of the relationship between landlord of the whole and assignee of part. The cases and statutes dealing with the more complex problems of leasehold interests exhibit no consistency of terminology. At one point a judge will refer to the estate when he appears to mean the land; at another, the Law of Property Act, 1925, will make, in relation to " land," provisions which are meaningless unless applied solely to the estate.[8]

[4] *Barnard* v. *Goodscall* (1612) Cro.Jac. 309; *Thursby* v. *Plant* (1670) 1 Wms. Saund. 237; *House Property and Investment Co.* v. *Bernardout* [1948] 1 K.B. 314.
[5] *Bachelour* v. *Gage* (1630) Cro.Car. 188.
[6] *Broom* v. *Hore* (1598) Cro.Eliz. 633; *Bailiffs of Ipswich* v. *Martin* (1616) Cro.Jac. 411.
[7] *Orgill* v. *Kemshead* (1812) 4 Taunt. 642 at p. 643.
[8] *e.g.*, Law of Property Act, 1925, s. 77 (7).

Verbal inexactitude is not necessarily to be regretted, nor, in practice, is it commonly of great importance; but in the situations under discussion it will be seen to lead, not merely to incoherence, but to injustice. As a preliminary, therefore, it may be helpful to " strip the mind of the idea of matter " [9] and analyse the facts in terms of the familiar dialectic of the conveyancer.

On the grant of a lease, the lessor parts with the right to occupy his property, to use it in a particular way, to repair it and so on. These rights are exercisable in space—the demised premises—and for a time—the length of the lease. The totality of the rights, projected for the time they can endure, makes up the concept of the estate; a present, valuable, though metaphysical, entity. The estate which the lessee holds is not the premises themselves, nor is it any one of the rights granted him, nor is it the length of time for which these rights may be exercised. It is created and crystallised once and for all on the grant of the lease [10]; and it is linked with the lessor's estate by the lessee's duties, the benefits of which replace, within the reversionary estate, the rights granted away. The point which emerges is that, *quoad* the landlord, the estate he has granted is one and indivisible. No disposition by the lessee ought to have any effect on the rights of the lessor. A physical severance of the premises by the lessee—or, strictly, an agreement with some third party whereby the rights of enjoyment are confined to separate parcels—ought to affect only the interest as held by the lessee, not the relations between the lessor and that interest. Though, indeed, the severance of the lease sets up a synallagmatic relationship between the lessor and the assignees of the severed parts of the premises, the lessor's rights are paramount to any contained in the instrument of severance.

Unfortunately, however, this account of the situation in terms of the appropriate concepts only seems to hold good in relation to the landlord's right of re-entry. In considering his right to bring an action for the rent certain inherent and intractable contradictions emerge. But first a preliminary point must be taken.

(i) *Distress for rent*

It is well settled that the severance of the demised premises in no way affects the landlord's right to distrain on any part for the rent of the whole.[11] The remedies of an assignee of part who is thus compelled to pay all the rent will be considered later.

[9] *Bally* v. *Wells* (1769) 3 Wils.K.B. 25, *per* Wilmot C.J., at p. 30.
[10] Thus, the later cancellation, by mutual consent, of the deed has been held not to divest the lessee of his estate, nor deprive the lessor of his action on the demise : *Lord Ward* v. *Lumley* (1860) 5 H. & N. 87.
[11] *Curtis* v. *Spitty* (1835) 1 Bing.N.C. 756.

(ii) *Action for rent*

The landlord can recover the whole rent from the original lessee by reason of privity of contract. Can he do so against an assignee of part, whose liability is based on privity of estate? As far as the landlord is concerned the estate he has granted is whole and entire. Yet, from the point of view of the assignee, he can hardly be in privity of estate with the landlord in respect of the whole of the land demised, for he has no estate at all in part of it. The same argument applies to an assignee of the other part. It would seem, therefore, that the privity of estate is divided between the respective parcels, and with each part of the estate go those rights and liabilities which pertain to the distinct property in which it subsists. If this be true, however, the act of the lessee has altered the landlord's rights for the worse: for, apart from his contractual remedies, which may become impracticable to pursue, his rights against any single assignee of a severed part of the demised property would appear to be limited to actions in respect of acts or omissions affecting the distinct parcel held by the assignee. This conflict between the indivisibility of the estate *quoad* the landlord, and its severance as between assignees of different parts, has led to some confusion.

One thing has been clear since 1678: an assignee of part can be sued for that proportion of the rent which is attributable to the property he holds.[12] In the case of *Gamon* v. *Vernon*,[13] " A lessee assigned a moiety of land for the whole term, the lessor brought debt against the assignee for a moiety of the rent; and it was moved in arrest of judgment that both the privity of estate and contract in this case remain entirely in the lessee and by consequence the moiety of the assignee not chargeable. But *per totam curiam* the assignee having the entire estate in one moiety of the land he hath the privity of estate sufficient to be charged by the lessor for a moiety of the rent if he will."

A century later counsel returns to this argument: " As against the original lessee debt will lie for the whole rent though he retain only part of the premises because of the privity of contract. But an assignee is liable only from the privity of estate: consequently he must be charged according to the truth of the case, which here is

12 Presumably if the apportioned rent bears no relation to the respective values of the severed parcels, a true apportionment will be made by a jury; *Salts* v. *Battersby* [1910] 2 K.B. 155. The apportionment will be based " not on the bare acreage, but on the relative values." Any building, etc., is, of course, to be taken into consideration.

13 (1678) 2 Lev. 231. The statement by Greer J. in *United Dairies Ltd.* v. *Public Trustee* [1923] 1 K.B. 469 at p. 475, that the defendant in *Gamon* v. *Vernon* was assignee of an undivided moiety appears to have been made *per incuriam*.

that he is assignee of part only." [14] And, in a more modern case, the opinion was expressed, *obiter*, that " where leased land is physically divided it is possible to say that the covenant imposed by law through privity of estate is confined to the part of the land in respect of which there is privity of estate between assignee and landlord." [15]

It is not certain, however, that this view would prevail against a landlord seeking to recover all the rent. On his part it might well be argued that no act of the lessee should be allowed to sever the estate held of the lessor. The question was raised, but shelved, by Tindal C.J. in *Curtis* v. *Spitty*.[16] In debt for rent against an assignee the defendant traversed an averment in the declaration that " all the estate " was vested in him. He then proved that he had taken an assignment of part only of the land and the plaintiff failed. His counsel was driven to contending that all the rent could be sued for, and the learned Chief Justice dealt with that argument in these words: " The proposition contended for by the plaintiff is this . . . that the lessor may charge the assignee of part of the land in an action of debt with the rent of the whole of the land comprised in the original demise. He may, undoubtedly, after an assignment of part, distrain upon that part for the rent which accrues due for the whole; because the rent for the whole becomes due out of each and every part of the land; but in this case it must be remembered that the avowry would be for rent due from the original tenant and nothing would appear on the record as to the assignment. The remedy by distress does not, therefore, afford any authority for the remedy by a direct action of debt against the assignee; which action, depending as it does upon the privity of contract being transferred to the assignee by reason of the privity of estate, that is, by reason of the plaintiff being the landlord and the defendant the tenant of the same land, opens a very nice and difficult question, not settled by any decision in the books so far as we can ascertain, namely whether there exists a privity of estate in respect of the whole land by an assignment of part only." [17]

These words have been quoted at some length because they form the basis of the most recent expression of the judicial attitude to the problem. The point was not directly before the Court of Appeal in *Whitham* v. *Bullock* [18]; indeed, for the purposes of their decision it was assumed that an assignee of part could be sued only for part

[14] *Hare* v. *Cator* (1778) 2 Cowp. 766 at p. 768. The decision turned on a point of pleading.
[15] *United Dairies Ltd.* v. *Public Trustee* [1923] 1 K.B. 469, *per* Greer J. at p. 477.
[16] (1835) 1 Bing.N.C. 756.
[17] *Ibid.* at p. 760.
[18] [1939] 2 K.B. 81.

of the rent. Clauson L.J., however, reading the judgment of the whole court, expressly refused to decide whether or not an assignee of part could be sued for the whole rent; but his citation—apparently with approval—of the judgment in *Curtis* v. *Spitty* would seem to indicate that he thought it possible.

It will be observed that all the decisions bordering on this problem use the argument from privity of estate. With respect, this expression is of doubtful efficacy. It may be employed in two ways:

(1) to indicate that a tenant holds an estate in certain land of a particular landlord; or

(2) as a formula to describe the result of judicial activity in holding defendants liable, despite the lack of a contractual relationship with the landlord.[19]

In the cases so far, whenever (2) is used, (1) is present also; whenever a defendant has been adjudged liable on a " covenant imposed by law " he has in fact held of the plaintiff an estate in the particular land affected by the covenant. The danger which lurks in *Curtis* v. *Spitty* is that a court may use " privity of estate " as the ground for holding an assignee of part liable for the rent of all without adverting to the connection—as a matter of policy—between (1) and (2). The court may be faced with two arguments, each based on the doctrine of the estate and each self-sufficient. The defendant may say: the liability of an assignee for rent depends upon privity of estate; in this case the defendant has no estate at all in part of the land leased, therefore there can be no privity of estate in respect of the whole land and no liability for the whole rent. The plaintiff, taking his stand on the indivisibility of the estate *quoad* the landlord, may well proceed by analogy with the arguments accepted by the courts in proceedings to enforce forfeiture clauses: the right of re-entry operates to defeat the estate granted and this estate stands or falls in entirety: therefore, notwithstanding the fact that the premises are held in severalty and that one assignee has committed no breach, the entire estate is forfeit. Similarly, the entire rent should be exigible from the one defendant.

It is hoped that, when the question finally comes before the court it will not be solved exclusively by argument from the phrase " privity of estate," but that the policy issues will be squarely faced. A split lease is a focal point of conflicting interests; but one circumstance above all to which weight should be given is—what other defendants are available? A good reason for holding an assignee of part liable only for an appropriate part of the rent is the fact that the person in possession—as lessee or assignee—of the rest

[19] See, for instance, *Lord Ward* v. *Lumley* (1860) 5 H. & N. 87.

of the land can also be sued for an appropriate sum. This is surely a better approach than proceeding by inexorable deduction from the old incantations.

It might be hoped that some illumination would be afforded by the Law of Property Act, 1925. Unfortunately the relevant provisions are studiously noncommittal. Section 190 (3) makes equitable apportionments of rent binding on assignor and assignee and their respective successors in title but " without prejudice to the rights of the lessor." It does nothing to define those rights. The next subsection provides:

" Where—

(*a*) any default is made in payment of . . . part of a rent by the person who, by reason of . . . apportionment . . . is liable to pay the same; or

(*b*) any breach occurs of any of the lessee's covenants (other than in the case of an apportionment the covenant to pay the entire rent) or conditions contained in the lease, so far as the same relate to the land retained or conveyed, as the case may be;

the lessee for the time being of any other land comprised in the lease, in whom, as respects that land, the residue of the term or interest created by the lease is vested, who—

(i) pays or is required to pay the whole or part of the rent which ought to have been paid by the defaulter aforesaid; or

(ii) incurs any costs, damages or expenses by reason of the breach of covenant or condition aforesaid;

may enter into and distrain on the land comprised in the lease in respect of which the default or breach is made or occurs . . . and may also take possession of the income of the same land . . ." until he has recouped himself.

This provision contemplates that one tenant of part of the land will in some way have defaulted and, in consequence, the tenant of the other part has been made to suffer. The duties owed between the parties to the assignment comprise the whole area of operation of this subsection. The covenant (in the lease) to pay the rent is expressly excluded. But this cannot affect the landlord's contractual rights against the original lessee. That lessee is protected when he assigns part, for, if the assignee defaults, the lessee can be " required to pay " all the rent or may " incur damages " because of his contractual liability. He will then have the remedies of distress and so on. What is not so clear is why the assignee is given protection; he only needs it if he can be made to answer for the lessee's default. If the latter, say, fails to pay the agreed proportion

of the rent, the former has his remedies if he is " required to pay " it. But does " require " mean a simple request, or a demand backed by compulsion? The sanctions which can be employed by the landlord are distress and forfeiture, but can he sue the assignee as he can certainly sue the lessee? The answer is unknown.

(iii) *Action on the other covenants*

The landlord has a right of action against the assignee of part for breach of such covenants as touch and concern the land. He can certainly claim damages limited to compensation for a breach of covenant in so far as it affects the distinct parcel held by the assignee. As it was put in 1631, " the covenant to repair is dividable and follows the land." [20] There seems to be no report of any case in which a landlord has attempted to make an assignee liable in damages for a breach of covenant affecting the part not assigned to him. Indeed, any such action would be most unlikely as the landlord would hardly get over the first hurdle—that of showing that, within the second resolution in *Spencer's Case*,[21] he is suing on a covenant which touches and concerns the thing demised.[22]

(iv) *Forfeiture*

The greatest threat to an assignee of part is the right of re-entry reserved in the lease; a threat which is in no way lessened by the obscurity of its operation. The question can conveniently be considered in three stages: can the landlord forfeit the lease in respect of all the premises comprised in it; if so, can an assignee of part apply to the court for relief; and, if so, on what terms will such relief be made available?

*Forfeiture of the whole lease.* It may be assumed that A, the assignee of Blackacre, has paid the rent and carefully observed the covenants relating thereto; but the person in possession of Whiteacre —the original lessee, his assignee, or a sub-tenant of either—may not have behaved so dutifully. Indeed, if the original lessee is still in occupation (by himself or his sub-tenant), a breach of a merely personal covenant may induce the landlord to seek to exercise his right of re-entry.

It seems clear that an assignment of part of the land held in lease neither removes nor limits the landlord's right of re-entry in respect

20 *Congham* v. *King* (1631) Cro.Car. 221; and see *Conan* v. *Kemise* (1631) Jones W. 245.

21 (1583) 5 Co.Rep. 16a.

22 The Landlord and Tenant Act, 1927, s. 20, which provides for an official apportionment of rent in the case of a split lease, makes no mention of other covenants. The reason for this may be that a severance of the lease automatically splits the liability on them.

of the whole tenement. It has been observed that the estate granted by the landlord is, from his point of view, for ever indivisible; it stands or falls *in toto*.

This appears always to have been recognised by the courts. The point usually arises in cases on contracts to take a lease, where an intending purchaser has discovered that the property he has agreed to buy is held in the same lease with other property and subject to a right of re-entry. Unless there is an express disclosure in the contract the purchaser can rescind and recover his deposit and expenses at common law [23]; and equity will not force specific performance on him.[24] The reason for the courts' attitude is that the purchaser will not get a good title since " he will be liable to be deprived of it by a forfeiture occasioned by the acts of other parties." [25]

The contention is strengthened by the fact that, during the last war, the legislature found it necessary to make special provision for such cases in these words: " On any application . . . for leave to enforce a judgment or order for the recovery in default of payment of rent of possession of land held in distinct parcels under one lease by two or more lessees, the court may (notwithstanding that a single rent was reserved by the lease and the proviso for re-entry in default of payment of the rent was not severable) order that the application shall be dealt with as if those parcels had been held under distinct leases. . . ." [26] As the emergency powers have long since lapsed,[27] it may confidently be assumed that severance of the lease does not *per se* affect the landlord's right of forfeiture.

However, if the landlord is seeking to re-enter for some breach of the lessee's covenants other than that relating to the payment of rent, he must comply with the statutory requirements regarding the service of notice. The Law of Property Act, 1925, s. 146 (1), requires the notice containing the prescribed information to be served on " the lessee." It does not say " a " or " every " lessee, or " any " or " all " lessees. Where the premises are held by joint lessees, all must be served [28]; but in the situation under discussion the respective owners are not joint tenants. The definition section is of no help, and it seems possible that a landlord may comply

23 *Barnewall* v. *Harris* (1809) 1 Taunt. 430; *Blake* v. *Phinn* (1847) 3 C.B. 976.
24 *Fildes* v. *Hooker* (1818) 3 Madd. 193; *Darlington* v. *Hamilton* (1854) Kay 550; *Hyde* v. *Warden* (1877) 3 Ex.D. 72 (in this case both headnote and court refer to the interest to be taken as an " under-lease." The facts, however, show that it was an assignment of part); *Cresswell* v. *Davidson* (1887) 56 L.T. 811; *Re Lloyds Bank Ltd. and Lillington's Contract* [1912] 1 Ch. 601.
25 *Leuty* v. *Hillas* (1858) 2 De G. & J. 110, *per* Lord Cranworth L.C. at p. 122.
26 Courts (Emergency Powers) Amendment Act, 1940, s. 5 (2), replaced by Courts (Emergency Powers) Act, 1943, s. 3 (4).
27 On October 8, 1950; S.I. 1950, No. 1647.
28 *Blewett* v. *Blewett* [1936] 2 All E.R. 188; and see *Gill* v. *Lewis* [1956] 1 All E.R. 844; *Wilson* v. *Hogan* (1958) 109 L.J. 204.

sufficiently with the statute by serving notice on the lessee of part; who will, in all probability, be the person in possession of that part of the premises on which there has been some breach of covenant. A notice relating only to part of the premises is perfectly good. If the landlord is relying on a breach of a repairing covenant then, by the Landlord and Tenant Act, 1927, s. 18 (2), he will not be able to forfeit the lease unless he proves that the service of the notice was known to (a) the lessee or (b) an under-lessee whose immediate lessor has only a nominal reversion or (c) the person who last paid the rent due under the lease. These requirements are open to the same doubt as those in the Law of Property Act; they leave unprovided for the case where notice has been served on a lessee of part, without the knowledge of the lessee of the other part. The innocent assignee may, therefore, find that all is over; that the lease is forfeit without his knowing anything about it. The proper notice may have been served on the tenant of the other property, who may have preferred to do nothing, or may have failed to serve a counter-notice in those cases where one is required as a condition precedent to the grant of relief.[29] Section 196 (2) of the Law of Property Act, which regulates the service of notice, provides that a notice shall be sufficient " notwithstanding that any person to be affected by the notice is absent . . . or unascertained."

*Right to relief.* If it be assumed, however, that the service of the notice has become known to A—the innocent assignee—can he apply for relief? The answer is by no means clear; and some attention must be paid to the statute which confers a right of application. Section 146 (2) of the Law of Property Act, 1925 provides:

" Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may . . . apply to the court for relief . . ." Here again the question is whether an assignee of part is included in the words " the lessee." Comparison with subsection (4) is revealing: " Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture . . . the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease *or any part thereof* . . . make an order . . ." [30]

It may be argued that the omission of the words " or any part thereof " in the provision dealing with a lessee's right to apply for relief means that an application under section 146 (2) must be made by all the persons in whom the original estate is vested, whether jointly or in severalty. This has been held to be the rule where the

[29] *e.g.*, Leasehold Property (Repairs) Act, 1938, as amended by the Landlord and Tenant Act, 1954, s. 51.

[30] Italics added.

lease was vested in joint tenants, and the case may have some bearing on the situation where the estate has been split. In *T. M. Fairclough & Sons Ltd.* v. *Berliner*,[31] in an action for forfeiture for breach of a repairing covenant, the appropriate notice had been served. The lease was held by joint tenants, only one of whom applied for relief. It was held that, in such circumstances, relief could not be granted. The landlord's counsel argued thus: " The section might have said ' a lessee '; what it does say is ' the lessee ' and, the phrase ' the lessee ' being used, the section cannot apply where there are several lessees unless all of them apply for relief. The necessary application has, therefore, not been made." [32] The reasoning of the learned judge may well bear extension to situations where the lessees hold in severalty. He said:

> " In the present case in my judgment it is not accurate to say that the [applicant] is the lessee. The lessees here are joint lessees . . . section 146 (5) states that ' lessee ' includes an original or derivative under-lessee and the persons deriving title under a lessee; but it does not in any way lead to the conclusion that, if there are two or more joint lessees, one of them can apply to the court for relief; and there seems to me to be a very great objection to a provision which would enable him to apply to the court, unless the provision also in some way enabled the court, in granting relief, to absolve the other joint lessee from future liability. The section is in the nature of an indulgence to be given to a lessee or to several lessees who have not complied with their contractual obligations. The effect of granting relief under that subsection is to restore the lease as though it had never been forfeited . . . Accordingly, if I were to accede to the application on behalf of the [applicant] the result would be that the [non-applicant] would continue to be liable under the onerous covenants contained in these leases, including the onerous covenant to pay the rent . . . In my opinion section 146 (2) can be applied in the present case only upon the application of the two joint lessees and, no such application having been made, it seems to me that the court has no jurisdiction to grant relief." [33]

The decision is based on two propositions: first, on the meaning of the actual wording of the statute—" the lessee "; and secondly, the supposition that relief could not be granted to one without

[31] [1931] 1 Ch. 60.
[32] *Ibid.* at p. 64.
[33] *Ibid.* at pp. 66, 67.

restoring the lease *in toto* and thus imposing on the other a continuing liability. This may well be the case where the lessees are joint tenants; but where distinct parcels are held in severalty it may be questioned whether the application of one need be defeated on the ground that the court lacks power to exonerate the other. It is clear that, if an under-lessee of part is applying for relief, the court has discretion to award him a lease of his part and enforce the forfeiture as regards the rest of the property. To hold that an assignee of part cannot obtain the same result is to found an argument on the ground that he must apply under section 146 (2) which, interpreted narrowly, makes no provision for a lessee of part. Even if such a technical construction holds good, however, its effects can be circumvented very simply. Let the assignee of part *grant himself an under-lease* of that part for the remainder of the term vested in him, less a nominal period. Since 1925 " a person may convey land to or vest land in himself;" [34] and, as was observed in a recent case, " no doubt . . . you may create a term in favour of yourself." [35] Admittedly, such a disposition creates problems with regard to the enforceability of covenants, but these difficulties need not concern an assignee of part whose sole desire is to bring himself squarely within the words of the statute. He is then a person " claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof." Indeed it is submitted that, even if no such under-lease is granted, the fact that it could be used for this purpose is a good argument with which to persuade the court to extend " the lessee " in section 146 (2) to cover an assignee of part.

If the cause of the forfeiture is non-payment of rent by the person in possession of the rest of the property, the innocent assignee can, if the landlord has not already entered, grant himself an under-lease and apply for relief under section 146 (4) which extends its help to under-lessees in such circumstances. If the landlord has in fact entered, that subsection is of no avail and the applicant must claim relief under the Common Law Procedure Act, 1852.[36] The words of the relevant sections are wide enough to cover his case—the statute refers to " the lessee or his assignee or other person claiming or deriving under the . . . lease." [37] But he will find that, to obtain relief, he must pay into court " all the rent and arrears together with the costs." [38]

[34] Law of Property Act, 1925, s. 72 (3).
[35] *Rye* v. *Rye* [1960] 3 W.L.R. 1052, *per* Lord Evershed M.R. at p. 1057.
[36] *Rogers* v. *Rice* [1892] 2 Ch. 170.
[37] s. 210; see *Doe* d. *Wyatt* v. *Byron* (1845) 1 C.B. 623.
[38] s. 212.

*Terms of relief.* Having established the right to apply for relief—even, if necessary, by means of the appalling fiction of an under-lease to himself—the assignee of part will find that the court may make an order vesting " . . . the property comprised in the lease or any part thereof in the person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document payment of rent . . . as the court in the circumstances of each case may think fit." [39] What must now be considered is the court's power to relieve the innocent assignee without imposing on him the necessity of performing covenants broken by the person in possession of the rest of the property.

If he applies as under-lessee, the forfeiture destroys the term which he holds as assignee.[40] The court, however, will no doubt exercise its power to vest in him, for a similar term to that which he held as under-lessee, that part of the property of which he took an assignment. If it wishes, the court has power to vary the rent; but, assuming that the original apportionment of rent bore a fair relation to the respective values of the severed parcels, this should not trouble the applicant.

Generally speaking, a condition of relief is the remedying of the breach which gave rise to the right of re-entry; and there is no doubt that the court has discretion to impose such an obligation on the applicant.[41] The principles laid down for the court's guidance in *Rose* v. *Hyman* [42] are based on the assumption that the applicant will be required to act; although those principles are more in the nature of maxims to be considered than rules to be obeyed and " there may be cases in which any or all of them may be disregarded." [43]

There appears to be no reported case on the exercise of the court's discretion in favour of an assignee of part of the land demised; but the recent decision in *Chatham Empire Theatres (1955) Ltd.* v. *Ultrans Ltd.*[44]—though concerned with an under-lease—throws some light on the judicial attitude. The head landlords were seeking to forfeit a lease, which comprised several properties, on the ground of non-payment of rent. The only effective defendants were under-lessees of part who contended that they were entitled, in the court's discretion, to relief from forfeiture without being required to pay to the plaintiff the whole rent reserved by the

[39] Law of Property Act, 1925, s. 146 (4).
[40] *G.W. Ry* v. *Smith* (1876) 2 Ch.D. 235.
[41] Woodfall, *Landlord and Tenant* (26th ed.), Vol. I at pp. 959, 960.
[42] [1911] 2 K.B. 234.
[43] *Hyman* v. *Rose* [1912] A.C. 623, *per* Earl Loreburn L.C. at p. 631; and see *Hoffman* v. *Fineberg* [1948] 1 All E.R. 592.
[44] [1961] 1 W.L.R. 817.

head lease. Salmon J. held that the under-lessees were entitled to relief on payment of that proportion of the total arrears of rent which the rent payable by them bore to the rent reserved by the head lease. He agreed " that in a case of relief against forfeiture the plaintiffs are entitled to be put back into the position that they would have been in had the forfeiture not occurred " but continued, " in this case the question is how that principle applies—and it does obviously apply—when a sub-lessee of part of the premises is claiming relief against forfeiture. Is the landlord entitled to be put back in the same position as he was in before the forfeiture *qua* the whole of the premises in the head lease or only in respect of the premises of which the sub-lessee is in possession ? " [45] After commenting on the dearth of authority the learned judge concluded that section 146 (4) conferred on the court " the widest discretion as to the terms upon which relief should be granted." He envisaged the situation where a large corporation took a lease of a block of shop properties and then sub-let separate shops to small shopkeepers. He pointed out that if the court's discretion was limited " . . . the court could not give relief to the small shopkeeper unless he paid the rent in arrear in respect of the whole block." [46]

It is submitted, with respect, that this decision is clearly reasonable and perfectly consonant with the discretion bestowed on the court.[47] It is suggested, further, that the fact that the severance is carried out by assignment instead of under-lease would be too technical a ground for holding that the court had no discretion—especially since, as has been pointed out, the applicant could " claim as under-lessee " by granting himself such an interest. There would appear to be no distinction in principle between cases where the forfeiture is occasioned by non-payment of rent and those where some other covenant has been broken by a person who is not the applicant. It is not contended, of course, that the court *must* grant the innocent assignee relief without imposing terms; all that need be done is establish that the court has a discretion. Thereafter one fact which will carry great weight is that the applicant " is perfectly blameless . . . and therefore entitled to every consideration." [48]

### 2. Rights of the Assignee

In accordance with the general rules an assignee of part of the demised premises may maintain an action against the lessor or his

[45] *Ibid.* at pp. 819, 820.
[46] *Ibid.* at p. 820.
[47] The early case of *Webber* v. *Smith* (1689) 2 Vern. 103—which was not mentioned by Salmon J.—shows that an under-lessee of part could be made to pay all the rent. Presumably the statutory discretion is wider than that originally exercised by the Chancery.
[48] *Ewart* v. *Fryer* [1901] 1 Ch. 499, *per* Kekewich J. at p. 506.

assignee in respect of such covenants as touch and concern the land actually held by him.[49] The great difficulty is to equip him with adequate rights against the person in possession of the other property. The ills which may befall A, assignee of Blackacre, in respect of Whiteacre are: he may be required to pay the whole rent reserved by the lease—he can be compelled to do so by distress, by those forfeiture proceedings in which he can only rely on the protection given by the Common Law Procedure Act, 1852, and—at the court's discretion—where he is applying for relief under section 146 of the Law of Property Act, 1925; and possibly he may be compelled to pay all the rent by action. Similarly he may, voluntarily, perform covenants for which, according to the apportionment, he is not responsible; or he may perform them under threat of forfeiture or at the direction of the court in his application for relief. For any of these, A will seek recompense. His position will differ according as the tenant in possession of Whiteacre is:

(a) the person who assigned Blackacre to A;

(b) assignee of such a person; or

(c) under-lessee of either.

### (a) Rights against the assignor

The Law of Property Act, 1925, s. 77 (1) (D), provides (*inter alia*) that in an assignment for valuable consideration of part of the land comprised in a lease, where the rent has been apportioned without the consent of the lessor, certain covenants are implied on the assignee's behalf [50] and similar covenants on the part of the assignor are implied if he " conveys or is expressed to convey as beneficial owner." [51] It may be observed in passing, that section 77 (which is new) throughout uses the words " conveys *or* is expressed to convey . . ." in contrast to the previous section which deals with freehold conveyances (and replaces section 7 of the Conveyancing Act, 1881); therein the formula is " conveys *and* is expressed to convey. . . ." It would seem, therefore, that the difficulties occasioned by the latter phrase where a person who is not a beneficial owner is so expressed to convey will not trouble an assignee of leasehold property; the assignor will remain liable on the covenants whether or not he is, in fact, beneficial owner.[52]

[49] *Palmer* v. *Edwards* (1779) 1 Dougl. 187; and see *Twynam* v. *Pickard* (1818) 2 B. & Ald. 105.

[50] There is no need for him to execute the instrument.

[51] On a similar transfer of registered land, covenants are implied by Land Registration Act, 1925, s. 24 (2). Many conveyancers, however, prefer to incorporate expressly those discussed in the text.

[52] See Megarry & Wade, *Real Property* (2nd ed.), p. 594, note 32 and the cases there cited.

The implied covenants, which are set out in the 2nd Schedule to the Act, Part X, are to the effect that each will pay the apportioned rent and perform all the covenants and conditions in the lease so far as they relate to the land held; and will indemnify and keep indemnified the other from and against all proceedings, etc., on account of any omission to pay the apportioned rent or any breach of the pertinent covenants. Thus, if A has to take it on himself to pay the rent of Whiteacre or perform any covenants which relate solely to that property, he will have an action against the assignor. Further, in an appropriate case, he may get an injunction against the assignor to stop a breach of covenant and in this way forestall a threatened forfeiture. It must be remembered, however, that an injunction will only be granted to procure the observance of negative obligations, and so will be of no assistance where the breach is, say, of a repairing covenant.[53]

Section 77 (7) provides that any covenant may be extended by providing that the " land " vested in the implied covenantor shall " stand charged with the payment of all money which may become payable under the implied covenant." Such charges are frequently inserted in instruments of apportionment; they cannot be registered as land charges,[54] and are not affected by the rule against perpetuities.[55] Their value, however, is doubtful, for two reasons. First, if the apportioned rent payable to the lessor is nearly as much as the net rack-rent, the charge affords very slight security. Secondly, despite the words of the statute, it is the estate which is charged, not the land; and, if the estate ceases, by forfeiture or in any other way, the charge dies with it.

As has been seen,[56] the Law of Property Act, by section 190 (3) and (4), gives a power—subject to any contrary agreement—to enter the defaulter's land and distrain or take the income in order to satisfy a claim for rent paid to the lessor or costs and damages incurred.[57] The rule against perpetuities does not apply to such a power of entry.[58] Here again, the protection is not so great as first appears. The value of the right of distress depends upon the availability of chattels which may be taken; and the right to take the income is unaccompanied by any power to lease. Furthermore, the section does not give the one right that an innocent assignee would

53 See *Wheatley* v. *Westminster Brymbo Coal Co.* (1869) L.R. 9 Eq. 538.
54 Law of Property (Amendment) Act, 1926, Sched., amending Land Charges Act, 1925, s. 10, Class C (iii).
55 Law of Property Act, 1925, s. 162 (1) (*a*).
56 *Supra*, p. 390.
57 The section extends to a transfer of a registered interest: Curtis & Ruoff, *Registered Conveyancing*, p. 357.
58 Law of Property Act, 1925, ss. 162 (1) (*a*), 190 (8).

find most useful in averting forfeiture—namely, the right to enter and, say, effect repairs, recovering the cost from the defaulter.

### (b) Rights against an assignee

If the rights against an assignor are imperfect, those against an assignee from him are slender indeed. Section 77 (5) of the Law of Property Act, 1925, provides that the benefit of the covenants implied on apportionment shall run with the estate of the covenantee; but there is no such provision with regard to the burden. Consequently, once Whiteacre has been assigned, A will find himself unable to sue the assignee on the covenants. At first sight it might appear that section 80 (2) of the Law of Property Act, 1925, could be called in aid: " Every covenant running with the land . . . shall take effect in accordance with any statutory enactment affecting the devolution of the land, and accordingly the benefit or burden of every such covenant shall vest in or bind the persons who by virtue of any such enactment or otherwise succeed to the title of the covenantee or the covenantor as the case may be." But this provision must be read in conjunction with section 80 (4)—" . . . a covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor as the case may be." In other words the earlier subsection is only intended to bring the devolution of the burden or benefit into line with the new law in sections 78 and 79, by which covenants are deemed to be made with, and on behalf of, the successors in title to the parties. Now it is trite, if unsatisfactory, law that the burden of a positive covenant passes to the covenantor's successors in title neither at law nor in equity [59]; and therefore it has been held in *Whitham* v. *Bullock* [60] that the burden of the covenants implied in an assignment of part of the land does not run with the rest. In the same case the " ingenious suggestion " that section 190 (3) operates to bring into being a statutory contract between the successors in title of the covenantor and the covenantee or his successors was rejected.

The right to enter and distrain or take the income of the land of the defaulter does bind the property; but its value depends very much on the circumstances.

The innocent assignee is not, however, totally without remedy. If he pays rent to the lessor which is, by the terms of his assignment, apportioned to the other property, he will have a right of contribution against any assignee of that other property. In *Whitham* v. *Bullock* the plaintiffs were assignees of part of the land held under

[59] *Austerberry* v. *Oldham Corporation* (1885) 29 Ch.D. 750.
[60] [1939] 2 K.B. 81.

one lease; the defendant was, by mesne assignments, in the same position with regard to the rest of the land. She failed to pay the landlord the rent due in respect of her property and the latter threatened the plaintiffs with distress. They paid all the rent due under the lease and were unable to make use of their own right of distress as the defendant's land was an unoccupied waste. They therefore claimed to be reimbursed the defendant's share of the rent. Against them it was argued that they could not have been sued for that part of the rent due from the defendant. The Court of Appeal assumed, without deciding, that this was the case, but agreed with counsel for the plaintiffs, saying, " . . . assuming that the tenant of a part of land cannot be sued by the landlord for more than his due proportion of the rent, it still remains that the plaintiffs in this case were forced by law to discharge, at peril of losing their goods, not only their own proportion of the rent . . . but the defendant's proportion of the rent . . . the [latter] sum was one which either the plaintiffs or the defendant could be forced by the landlord to bear, though forced in the case of the plaintiffs only by process of distress, and in the case of the defendant either by process of distress or by action for payment; the case was thus, it was said, one in which two persons could be made, directly or indirectly, to pay and that, since the landlord had, in exercise of his legal rights, chosen to secure to himself the [defendant's proportion of the rent] at the expense of the plaintiffs, the court would see that the burden, being inequitably placed by the exercise of the landlord's legal rights, should be equitably readjusted between the parties." [61]

It is possible that this principle could be extended to cover situations where, under threat of forfeiture, A incurs expense in carrying out other covenants—for example to repair—when the primary duty to do so is on the assignee of the other property. The main difficulty which would arise is that, in the absence of special provision in the deed of assignment, his entry on the defaulter's land would be a trespass.

### (c) Rights against an under-lessee

If the person who holds the estate in the rest of the premises creates an under-lease, and there is then default in the obligations imposed by the lease and apportioned to that other property, A, having been forced to pay, or having incurred damages, may recover on the covenant from the assignor, or by way of contribution from the assignee for the time being. But, apart from his power to enter and distrain, etc., he has no rights at all against the under-lessee.

[61] *Ibid.* at pp. 86, 87, *per* Clauson L.J., reading the judgment of the whole court.

He has no right on the covenants for they do not bind the land. Moreover, it has been held that he has no right of contribution.

In *Hunter* v. *Hunt* [62] the plaintiff and the defendant were under-lessees at distinct rents of separate parts of premises held under one lease at an entire rent. The plaintiff, having paid the whole rent under threat of distress, brought assumpsit to recover a proportion as money paid to the use of the defendant. He failed, Tindal C.J. remarking, " I cannot help thinking that the plaintiff's only remedy is in equity." [63]

Equity, however, was unimpressed by the compliment. In *Johnson* v. *Wild* [64] the plaintiff was assignee of part. Under threat of distress, he paid the whole rent due and sued for contribution from under-lessees of the remaining property. He too failed, and Chitty J. apparently based his argument on the undisputed fact that the defendants could not have been sued for the rent. He observed that the plaintiff " does not demand contribution from a person who is liable to a common demand because the defendants are not liable for the rent; and the defendants are not only not liable for the rent but nobody can sue them in respect of this supposed liability unless it be the plaintiff; whereas, in a common demand for which two persons are liable, if one pays then there is a right of contribution on the part of the one who makes the payments against the other who does not." [65]

It is true that, in this case, the defendants could not be sued for the rent reserved in the head lease; and this was the ground of distinction relied upon by the Court of Appeal in *Whitham* v. *Bullock*. But it is not clear that the distinction was well taken. The under-lessees were liable to distress; and the plaintiff, by paying, relieved them of a common burden; for the tenement owes the service. It seems over-technical to insist, as a prerequisite of liability to contribute upon a liability to be sued. Yet it was stated in *Whitham* v. *Bullock* that " it was essential to the defendant's liability that they should be persons who could have been sued by the landlord." [66] While it may be true that at common law such a liability is necessary, there seems no good reason to insist on it in equity. *Bonner* v. *Tottenham Court Building Society* [67] is relevant here. The question was whether a lessee who had paid all the rent could recover contribution from his assignee's sub-tenant. The Court of Appeal held that he could not; the interest for the purpose of this article lies in certain observations of Vaughan Williams L.J. He faced the question whether the liability of the defendant to distress

[62] (1845) 1 C.B. 300.
[63] *Ibid.* at p. 305.
[64] (1890) 44 Ch.D. 146.
[65] *Ibid.* at p. 150.
[66] [1939] 2 K.B. 81, at p. 89.
[67] [1899] 1 Q.B. 161.

for the rent was sufficient to make him liable to contribute and said, " I think it is not. I am now dealing with the principle upon which the common law liability is based. There is a common law principle of liability and a principle of liability in equity and these two principles differ. The common law liability requires a common liability to be sued. . . . The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached . . . even though there is no common liability to be sued." [68] In equity, he explained, a prerequisite to the liability to be sued was " a community of interest in something in respect of which one has borne a burden for the benefit of the other. . . ." [69] But the learned Lord Justice then took a very narrow view of the " something " in which there must be a community of interest and held that it was the head lease under which the plaintiff was liable on the covenant for rent, not the land which was liable to the burden of distress. It would not be straining judicial resource to hold that the community of interest in the land was sufficient to impose an equitable liability to contribute. Such an approach was, indeed, adumbrated in *Whitham* v. *Bullock*. " In the present case there is obviously community of interest in the subject-matter to which the burden is attached, that is in the two plots which are subject to the common burden of being liable to process of distress. . . ." [70] The result represents once more the confusion which can arise when the artificial concepts of property law escape, unnoticed, from captivity; for Vaughan Williams L.J. the estate is the focus of interest; for Clauson L.J. it is the land.

It would seem reasonable that—admitting the landlord's many and paramount rights—as between persons in possession of different parts of leasehold land each ought to bear his proper part of the burdens of the lease. " If," said Eyre C.B. in *Dering* v. *Earl of Winchelsea*, " we take a view of the cases both in law and equity we shall find that contribution is bottomed and fixed on general principles of justice and does not spring from contract." [71] Surely, if this excellent dictum were applied, the principle of contribution could be carried one stage further. If an under-lessee of part were compelled to pay to an assignee of the rest an appropriate part of the head rent, he could set off his payment against the rent due from him to his immediate lessor. Admittedly the latter is not liable on the covenant for quiet enjoyment in the sub-lease for the act of the head lessor [72]; but, as between under-lessee and his lessor, the former

[68] *Ibid.* at p. 174.
[69] *Ibid.* at p. 176.
[70] [1939] 2 K.B. 81, at p. 88. It would be just as true to say that there is community of interest in the estate held of the one landlord.
[71] (1787) 1 Cox 318, at p. 321.
[72] *Kelly* v. *Rogers* [1892] 1 Q.B. 910.

would have discharged a burden which the latter could be made to bear by action; which should allow the under-lessee, in his turn, to avail himself of the right of contribution.[73]

### Conclusion

It will be evident from the foregoing that a split lease is not an attractive proposition. A house-seeker will usually have little choice, but his mortgagee will not find the proposed interest satisfactory. A person who has agreed to take an assignment cannot be compelled to do so if the property to be taken is held in one lease with other premises—unless, of course, he has expressly contracted to take such a title.[74]

It is often suggested that the remedy in these situations is to take an under-lease of the property, leaving only a nominal leasehold reversion. This has certain advantages—it frees the purchaser from direct liability on the covenants in the head lease and brings him within the relief provisions of section 146 of the Law of Property Act, 1925, without the need for any devious manoeuvres. But it is still not altogether satisfactory. The menace of distress and forfeiture of the head term is still present, and it is always possible that, in a particular case, the court will impose on an innocent applicant for relief the necessity of shouldering the burdens affecting the remainder of the property. The purchaser may, of course, take from the sub-lessor a covenant whereby the latter promises to do nothing on the rest of the premises in the head lease to occasion forfeiture. This will afford a remedy against the covenantor; but it will no more bind his successors in title than the covenants implied in assignment of part. The reason is that such a covenant does not " touch and concern the thing demised." It clearly touches and concerns the estate demised, since it will save the sub-lease from an early death; but the House of Lords has held that the " thing demised " means the land, the physically apparent substance, and not its metaphysical reflection, the estate.[75] The practical consequences are considerable, in that an under-lessee is only able to feel secure if his rent is high enough to ensure the servicing of the head lease; a consolation both uncertain and expensive.[76]

If the purchaser is faced with the necessity of taking an assignment of part of the leased land he may apply to the Minister of

[73] In Williams' *Vendor and Purchaser* (4th ed.), Vol. I, p. 416, it is suggested that *Johnson* v. *Wild* should have been dealt with under the principle that anyone having a partial interest in land who pays off a charge on the whole is presumed to keep the charge alive for his own benefit.

[74] See the cases cited *supra* in notes 23 and 24.

[75] *Dewar* v. *Goodman* [1909] A.C. 72. The line begotten by *Spencer's Case* (1583) 5 Co.Rep. 16a displays a tenacious concentration on land as opposed to estates.

[76] See (1960) 24 *Conveyancer*, at p. 492.

Agriculture for an apportionment of the rent under section 20 of the Landlord and Tenant Act, 1927.[77] In this way he can free himself from any liability for the rent of the other property. But there seems to be no power under the section to order an apportionment of the rest of the covenants or to sever the right of re-entry.

His most satisfactory course of action is to persuade the landlord to be a party to the assignment and to concur in the apportionment of rent, the severance of the premises, and a provision that the right of re-entry shall only extend to that part on which default occurs.[78] The result will be virtually the creation of an entirely separate leasehold interest.[79] It is unfortunate, however, that this method, so attractive to the purchaser, is rarely acceptable to the landlord.

77 The section presumably intended to provide for severance of land held on long leases without the usual covenants, but it is not expressly so confined.

78 A lease of property which is to be developed in smaller units should contain a provision requiring the lessor's consent to such a course.

79 Though even then he may fail to get specific performance against a purchaser unless all the facts of the severance have been disclosed: see *Darlington* v. *Hamilton* (1854) Kay 550.

# " PERMITTED USE "

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## Meaning of " Permitted Use "

The purpose of this article is to consider the meaning of the expression " permitted use " in the context of the Town and Country Planning Acts. Although Special Condition H of the National Conditions of Sale [1] provides that " The property is sold on the footing that the permitted use thereof for the purposes of the Town and Country Planning Acts is . . ." and the corresponding provision in the Law Society's Conditions of Sale [2] is that " The property is sold on the footing that there is no development thereon in contravention of the Town and Country Planning Act, 1947, and that the permitted use under the said Act is the use as . . .", this article is not concerned with a problem of statutory interpretation because the expression " permitted use " does not appear in any of the Town and Country Planning Acts nor in the Orders made under them. An inquiry into the meaning of the expression is, however, important, not only because of the inclusion of the expression in most contracts for the sale of land but also because of its use by many writers on town planning, though the more cautious writers use the expression in quotation marks [3], which, perhaps, indicates that the words do not mean what they appear to mean.

It is thought that, broadly, by " permitted use " is understood a use which was the permanent and non-contravening use on the appointed day, or a use subsequently instituted pursuant to planning permission, provided in the first case that no development has been carried out following planning permission and provided in both cases that no revocation order nor discontinuance order [4] has been made. This statement is only a broad indication, and not a definition, for a definition should make reference to, for example, contravening uses carried on for more than four years, but for present purposes it is sufficient to point out the essence of the phrase " permitted use " as it is generally understood, which is that it is a *continuing* legal characteristic attached to the land. The major submission of this

[1] 17th ed., 1959.
[2] 1953 ed.
[3] *e.g.*, Potter, " Caveat Emptor " (1949) 13 *Conveyancer* 36 at p. 39, and Corby, " Is the Permitted Use a Matter of Title? " (1949) 13 *Conveyancer* 329 at p. 355.
[4] Under ss. 21 (1) and 26 (1) of the 1947 Act.

article is that in this sense there is no such concept known to English law, and that the currency which the expression " permitted use " has gained is due to inconsistency between Part II and Part III of the 1947 Act.

The inconsistency between Part II of the Act, which deals with development plans, and Part III, which is concerned with the control of development, can be clearly seen by a return to general principles. In the well-known words of the Explanatory Memorandum on the 1947 Bill [5]: " The object of town and country planning is to secure that all the land in the country is put to the use which is best from the point of view of the community " and the major constructive instrument by which this is achieved is the development plan which indicates, first, the manner in which the local planning authority propose that land in their area should be used, and, secondly, the stages by which any such development should be carried out.[6] Local planning authorities were instructed to prepare their first development plans to cover a period of twenty years from 1951 [7] and, after some fluctuation in ministerial policy, it is at present settled that, in preparing amendments to development plans, local planning authorities should continue to look forward for twenty years.[8] Development plans are, therefore, both to a large degree forward looking, and also concerned with the use of land over a period of time, in the sense that the proposed or conforming use shown on a development plan is not intended to be the use only at one specific time, but, broadly speaking, the use from the time of its inception until a new development plan proposes a different use.[9]

### Statutory policy as regards change of use

With the forward looking and continuing aspects of the development plan can be contrasted section 12 (2) of the 1947 Act, which controls, *inter alia*, the " making of any material change in the use of land." What is controlled primarily is the *change* rather than the new use. As it has been expressed, " It is important to

5 " Town and Country Planning Bill, 1947: Explanatory Memorandum " (Cmd. 7006).

6 s. 5 (1) of the 1947 Act.

7 Ministry Circular No. 59 dated December 13, 1948.

8 Circular 9/55 suggested that in the first review of the development plan, the plan should continue to be concerned only with the original twenty years from 1951. This policy has been reversed in Circular 37/60 in respect of the second quinquennial review, which should accordingly look forward to 1981. See further para. 22, " Development Plans—Their Status, Making, Review and Effect " by Desmond Heap and P. T. M. Wilson, a paper read to the Law Society's week-end course at Oxford, April 1961.

9 " Broadly," because planning permission contrary to the development plan can be granted either under the Town and Country Planning (Development Plans) Direction, 1954, or after reference to the Minister.

remember that what is authorised is not the new use but the change of use." [10]

It would have been easy and, indeed, in view of Part II, logical for the control machinery to have attached directly to each piece of land a use, and to have provided for permission to be given for future uses as such, rather than for the change from one use to another and there are slight indications that this idea was contemplated. For example, the now repealed section 69 (1) of the 1947 Act provided that " no such use shall be instituted *or continued* " [11] and section 1 (1) of the 1953 Act enacts that " . . . Part VII of the Town and Country Planning Act, 1947, . . . shall not apply and shall be deemed never to have applied to . . . uses of land instituted on or after " November 18, 1952. Leach uses these authorities to say that " ' change of use ' seems to be used as synonymous with ' institution of a use ' " [12] and he might have referred also to Class IV (ii) of the First Schedule to the General Development Order, 1950, which grants " blanket " permission for the *use* of land not within the curtilage of a dwelling-house [13] for any purpose on not more than twenty-eight days in total in any calendar year. In contradistinction, however, to any such system of attaching to each unit of land a use and providing for permission to be given for *uses*, section 12 is unambiguously concerned primarily with the " making of the *change* " rather than the new use, and as a consequence the whole of the control machinery of the Act is concerned with the situation only at one point of time, when the change is made.

### Importance of prior use

Moreover, although the local planning authority will be almost exclusively concerned with the proposed use, the control machinery places equal importance on the past as well as the future. In a change from A to B, logically A is as important a factor as B, as the result of the change is simply the difference between A and B, and the making of the change is effecting the difference. It would probably have been possible to have combined the basis of control being on the change rather than the use with the sole concern for the proposed use if the Act had controlled the making of a change *to* a new use, for then the previous use would be insignificant, but by controlling the making of a change " *in the use* " equal emphasis is placed on the uses before and after the change. It follows that if planning permission is granted for a change from A to B, what is

[10] Leach, " Practical Point " [1957] J.P.L. 458 at p. 459.
[11] Emphasis supplied.
[12] Leach, " Changes of Use " [1953] J.P.L. 404, 405.
[13] And not on the site of a war-damaged building.

authorised is not B but the change from A to B, so that if the use before the change is in fact C, and not A, because the change from C to B is not permitted, any change to B is unauthorised, and there is a consequent liability to enforcement proceedings. It is thought that there is no reported case where this point has been taken to the courts or to the Minister, no doubt due in part to the fact that the local planning authority will have planned in accordance with Part II of the Act, and will be mainly concerned to secure the establishment of a particular use, irrespective of the nature of the previous use. It should not be thought, however, that whatever the theoretical merit of the argument that the previous use is as important as the new use in considering the effect of planning permission, it can never have practical importance. Suppose in an application to use a building, which has the external appearance of a dwelling-house, as two flats, it is stated that the existing user is as a brothel, the local planning authority might be influenced in granting permission by the desire to end the use as a brothel. If it subsequently appears that the use was not as a brothel but as a single private dwelling-house, the local planning authority might maintain that the development was not authorised, and the sympathy of any court would surely be with them. This example is bizarre, but the local planning authority might well decide if there is a change in the zoning of a particular area following a quinquennial review of the development plan to regard as unauthorised at least all changes made after application for permission which deliberately misstated the then existing use.

Support for the view here advanced that it is only the change expressly covered by the permission that is authorised would seem to be derived from Leach, who discusses the closely related situation where permission is granted for a change from A to B and also from A to C, and suggests [14] that if development is carried out pursuant to one of these permissions there would have to be a change back to A before advantage could be taken of the other permission. Further, emphasis that it is the change which is authorised and not the new use was also given by " R.P.C." [15] when he said that if a person, who had obtained planning permission for a change of use from A to B, but did not carry out that change, wanted to change to another use in the same Use Class as use B, planning permission would be required.

[14] Leach, " Practical Point " [1957] J.P.L. 458 at p. 459.
[15] " Practical Point " [1958] J.P.L. 232.

### Existing contravening use

The structure of the control machinery of the Act is, then, to require permission for a *change* from use A to use B, and not for use B, yet in view of Part II, it may be thought that what should have been authorised is use B. It is here that confusion creeps in, but before exploring it, it is necessary to dispose of one preliminary point. It now seems beyond doubt that when a change of use is being considered to see whether permission is required, what is to be taken into account is not the " permitted use " (whatever that might mean), but the " actual use." [16] Thus in one case [17] it was proposed to use for general storage and warehouse purposes premises the contravening use of which was as a furniture repository, and " the Minister held that as both that use and the proposed storage-warehouse use were within Use Class X, no development was involved notwithstanding that the former use had been begun in contravention of previous planning control." [18] There are other cases to the same effect.[19] These cases turn on the Use Classes Order which, if it applies, has the effect of making the change of use not development rather than granting permission for development, but it is thought that the situation where an application is made for planning permission is sufficiently analogous to make untenable any argument that what should be considered is a " permitted use " rather than the " actual use."

### Actual use

Because it is necessary to be able to determine what the use of a particular piece of land is at any one time in order that a change in that use can be considered, it is necessary to formulate a doctrine of use, that is the actual use, in order that the Act will work. While the concept of the " actual use " is therefore a necessary product of

[16] It is not the purpose here to discuss the constituents of the " actual use," but it is considered that in some cases questions of motive as well as the physical condition of the land are relevant.

[17] Bulletin of Selected Appeal Decisions: Decision IX/12.

[18] The report of this case is in [1951] J.P.L. 233.

[19] *e.g.*, [1951] J.P.L. 559. This was an appeal to the Minister against the determination by the local planning authority under s. 17 that the proposed change of use from a foot clinic to a doctor's consulting rooms constituted development. No planning permission had been obtained for the use as a foot clinic. " The Minister has come to the conclusion that the proposed use of the premises . . . and the previous use as a foot clinic fall within Class XV of the Town and Country Planning (Use Classes) Order, 1950. The fact that the use as a foot clinic was a contravening one is irrelevant for this purpose. The Minister accordingly determines that the proposed change of use does not constitute development within the meaning of the Town and Country Planning Act, 1947. . . ." See Ministry of Town and Country Planning Letter 1695/620/80, a copy of which was kindly supplied to the writer by the County Planning Officer, Surrey County Council.

the 1947 Act, to speak by analogy with the actual use and seemingly, in the light of Part II, of the " permitted use " is, it is submitted, confusing.

It is confusing because it is not a concept created by the Act, it is not necessary for the working of the Act, and it is liable to lead to erroneous discussion.

It has already been seen that the Act itself does not use the expression " permitted use." [20] Such a concept is not necessary for the working of the Act because, as has also been seen, on an application for the grant of planning permission, what is considered is not the " permitted use " but the actual use, and the " permitted use " is in no way relevant thereto. Furthermore, enforcement notices can be served under section 23 not in respect of uses that are not " permitted uses " but in respect of *changes* that were not permitted changes. The structure of Part III of the 1947 Act is built on the foundation of the permitted change and has no need of the foundation of the permitted use.

Those who have been cautious and have expressed the " permitted use " in quotation marks may have been using the phrase as an instance of legal shorthand, to mean a use the change to which was permitted [21] and if clearly understood in this sense the phrase may have merit. It is suggested, however, that the majority of readers of, say the Law Society's Conditions of Sale do not interpret the expression in that way, but rather as meaning a continuing legal characteristic attached to the land, which is the *result* of the permitted change. It must be admitted that they have some excuse. The Special Condition of these Conditions also provides that " the property is sold on the footing that there *is* [22] no development thereon in contravention of the Town and Country Planning Act, 1947. . . ." " Development " is very much a statutory word which means the *carrying out* of building, etc., operations or the *making* of any material change in the use.[23] The Special Condition seems to use this technical word not in the same way as the Act, which is unfortunate, but to mean the *result* of carrying out such operations or of making such changes. " Development " changes its meaning from, say, the erection of a house, to the house itself. In other words, both as regards " development " and as regards the " permitted use " there is the substitution of a continuing characteristic for the happenings at one point of time.

20 It is significant that the index to the Encyclopedia of Planning Law contains over thirty entries to " permitted development " but none to " permitted use."

21 Or which was the permanent non-contravening use on the appointed day.

22 Emphasis supplied.

23 s. 12 (2) of the 1947 Act.

**Fallacy of permitted use**

The submission is restated that except in the shorthand sense of a use the change to which is permitted, there is no concept known to English law as a " permitted use " as a characteristic continuing but possibly different from the actual use. In the typical situation where permission is given for the change of use from A to B, and, following that permission, the change is carried out, but later there is a change in the use from B to C without permission, to contrast the " actual " use, C with the " permitted " use B, is not only fallacious, because there is no authority for the concept of the " permitted use " at all, but also dangerous. Into this danger even Potter fell.

The danger is that, if it be assumed that there is something called a " permitted use," then it is logical to assume that it will probably have some significance. Thus it is not difficult to follow Potter's reasoning when he says [24] ". . . so long as the use is a contravening use, presumably there will be a valid use [25] which can be resumed at any time," though in fairness to Potter it should be added that he did state that there was no authority for his proposition.

Far from considering this erroneous, the natural reaction is that where a use is contravening, surely resumption of a valid use *can* be made at any time. It is thought that this is wrong because of the clear authority of sections 12 (2) and 24 (4) of the 1947 Act. The former subsection says that the " making of any material change in the use " is development, which requires permission (and in this context the " any " might be stressed), and as an exception the latter subsection says that " nothing [in Part III of the Act] shall be construed as requiring permission to be obtained thereunder for the use of any land for the purpose for which it could lawfully have been used . . . if the development in respect of which an enforcement notice is served . . . had not been carried out." It is noteworthy that this section is very narrow, being expressly limited to the case where an enforcement notice " is served " and it is not even extended to cases where an enforcement notice " could be " served, much less to the case where a contravening use has continued beyond the four-year period so that an enforcement notice could not be served.

That a change from a contravening use can be made without permission where an enforcement notice is served but not where a notice is not served is not a return to the proverbial Ass of the Law. Where development is carried out without permission, the local

[24] Potter, " Conveyancing under the Planning Acts " [1950] J.P.L. 879 at p. 882.
[25] This is the permitted use in a new name.

planning authority must, before serving an enforcement notice, " consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations " and then they only " may " serve a notice and not " must." Suppose, therefore, Blackacre to be used for residential use in an area zoned for office use. Suppose also that an application for a change of use of Blackacre from residential to office use would be granted, and that an application for a subsequent change from office to residential use would not be granted. If a change from residential to office use were made without permission, in the absence of " other material considerations " it is likely that the local planning authority would not serve an enforcement notice. The use as office use would therefore be contravening, and, were our submission that permission is required for a change to the residential use incorrect, the developer could change back at will to residential use and thus be in a better position than if he had obtained permission for the original change to office use. It is submitted then that ss. 12 (1) and 24 (4) gainsay the contention of Potter that the " valid " use can be resumed at any time and, if so, that the expression " permitted use " would therefore have no practical significance even if the concept which the expression purports to represent did in fact exist.

But the nonsense does not stop there. If it is legitimate to create a concept called " the permitted use," why not create yet more types of use? To recall the example given above: the use of Blackacre is changed with permission from A to B, and then without permission from B to C. The permitted use propagandists at this stage would claim that Blackacre has

(a) actual use C, and
(b) permitted use B.

Now suppose that four years have elapsed since the non-permitted change from B to C: it becomes debated whether the situation is

(a) actual use C, and
(b) permitted use also C, because no enforcement notice can be served

or,

(a) actual use C
(b) permitted use B
(c) non-permitted but non-enforceable use C.[26]

[26] Potter, " Penal Assessment of Development Charge " [1951] J.P.L. 280 at p. 281: " The contention of our learned correspondent confers upon a contravening use a title to the use that is less than a planning permission, but which renders a planning permission unnecessary. . . . This is a neat by-product of the legislation and provides us with three grades of use (i) contravening, (ii) permitted, (iii) lawful but not permitted.

In favour of the latter view, it can be argued that as no permission has been given it seems inappropriate to call use C " permitted " [27] and that while there is a four-year limit on enforcement notices, there is not necessarily such a limit on injunctions.[28] Furthermore, while development charges were still in operation, there was under section 74 no time limit on penal development charges.

It was in such an argument that Potter made the remark quoted above that the question was of importance because " so long as the use is a contravening use, presumably there will be a valid use which can be resumed at any time." Granted the premise, the question is important, and of interest, but it is the premise which is disputed.

The scope and drafting of the 1947 Act are such that legal " infilling " by the courts, the Minister, and others is necessary if town planning law is to become a coherent whole. One conclusion to be drawn from this discussion, however, is that it is dangerous to venture beyond what is necessary to make the Act work, at least unless practical difficulties arise which demand an answer.

[27] *Cf.* s. 23 of the 1947 Act with s. 4 (1) of the Building Restrictions (War Time Contraventions) Act, 1946, which provides that if no determination has been given by March 25, 1951, whether the works or use fail to comply with planning control the works or use concerned shall be treated for all purposes as complying therewith unless steps for enforcing the control have been begun before that date.

[28] *Cf.* Turing, " Back to Earth " [1951] J.P.L. 322 who argues that after four years it is unlikely that injunctions would be granted; and Potter, " Penal Assessment of Development Charge " [1951] J.P.L., at p. 282, who says " There is implicit in our learned correspondent's view a further point, namely, that a period of four years' contravening use legalises the use so that it could not be restrained by any other proceedings. We are not satisfied that this may be the case. There is nothing in the Act to suggest that an enforcement notice is the sole means of dealing with a contravening use, though it is clearly a convenient one."

# EASEMENTS AND THE RULE AGAINST PERPETUITIES

By G. Battersby

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*Dunn* v. *Blackdown Properties, Ltd.*,[1] raised a number of interesting questions concerning the effect of the rule against perpetuities on the grant of easements. The plaintiff was the owner of two plots of land. These plots had been conveyed to the plaintiff's predecessors in title together with the right for the grantees, their heirs and assigns to use the sewers and drains " now passing or hereafter to pass " under a private road, Pine Tree Hill, on which both plots of land abutted, and which belonged to the defendants' predecessors in title. At the time when the conveyances to the plaintiff's predecessors were made, there were not in existence any sewers over which the rights granted could be exercised, but at some time before the conveyance to the plaintiff, on September 20, 1945, a surface water sewer was constructed along Pine Tree Hill, and a soil sewer was built to pass from land lying north of this road, under the road for some distance and then on to other land owned by the defendants' predecessors in title. The easement was expressly conveyed to the plaintiff with the land, and she now claimed a declaration that she was entitled to use the sewers and drains then passing or thereafter to pass under Pine Tree Hill in connection with her two plots of land.

The defendants rested their case on two points:

(i) That the easement claimed by the plaintiff was void for perpetuity. In the absence of any life in being, the period was twenty-one years and the easement claimed might arise outside that period.

(ii) That, if this argument was rejected, the plaintiff was not entitled to use the soil sewer, since that ran over other land of the defendants which was not mentioned in any of the conveyances.

Cross J. found for the defendants on the first point and therefore refused the declaration. It was therefore unnecessary to consider the second point, but he did so, as a finding might be helpful in the event of an appeal.

1 [1961] 2 W.L.R. 618; [1961] 2 All E.R. 62.

**Application of the rule**

Cross J. dealt first with the perpetuity argument. The first difficulty was whether the rule against perpetuities applied to easements at all. The leading writers have not, so far, shown much confidence in their attempts to answer this question. Gray [2] considers that " grants of profits or easements *in futuro* seem to give true rights in property, and should therefore be subjected to the rule." Gale [3] seems to assume that the rule will apply in his statement that " the relevant question, it is thought, is not, will the right necessarily be exercised in due time, but, will the site of the easement be necessarily ascertained, and will the right granted necessarily become exercisable, in due time." He goes on to remark that " there is little authority on this point." Morris and Leach [4] state that this " is a question much discussed by writers; but the scanty and somewhat unsatisfactory authorities do not justify much dogmatism." They submit three propositions which accord very closely with the position suggested by Gale:

(a) If an easement is immediately created it is a vested interest, and therefore outside the rule.

(b) If an easement is immediately created, a provision for its termination on some remote event is valid, because the rule is not concerned with the duration of interests.

(c) The grant of an easement to begin at some remote time is void for perpetuity.

The previous authorities were by no means decisive. In *South Eastern Railway Co., Ltd.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*,[5] the plaintiff company bought a strip of land from one Calcraft, who by deed poll reserved to himself, his heirs and assigns the right at any time to make a tunnel under the railway line which the plaintiff company proposed to build. The defendant company, the assignees of the reservation, wished to build a tunnel, but the railway company claimed, *inter alia*, that the reservation was void for perpetuity. Swinfen Eady J. held that this was an immediate easement, and was therefore unaffected by the rule against perpetuities. In any event, he said, since the railway company was one of the original contracting parties, the promise could be enforced by the assignee of the benefit of it irrespective of the rule against perpetuities. On appeal the Court of

[2] *Rule Against Perpetuities*, 3rd ed., p. 301, citing as authorities, *inter alia*, *Lewis on Perpetuities*; *South Eastern Railway Co., Ltd.* v. *Associated Portland Cement Manufacturers (1900), Ltd.* [1910] 1 Ch. 12, and *Sharpe* v. *Durrant* (1911) 55 S.J. 423; [1911] W.N. 158.

[3] *Law of Easements*, 13th ed., p. 44.

[4] *Rule Against Perpetuities*, p. 221.

[5] [1910] 1 Ch. 12.

Appeal held that this was a simple contract which could be specifically enforced at the suit of the assignees of the benefit of the contract, but expressed no opinion whether the right was capable of ranking as an easement, or, if so, whether it would have been void for perpetuity. This case, therefore, is of little assistance on the point under discussion.

The second case which has some bearing on this question is *Sharpe* v. *Durrant*.[6] In 1889 a vendor conveyed to a purchaser a strip of land for use as a tramway, and reserved the right to cross the line at two points to be selected by him. The purchaser covenanted to provide crossings at the points selected. In 1892 the vendor selected one crossing point, and informed the purchaser of his choice, but no crossing was ever made. Subsequently, the purchaser sold the strip of land to the defendant. Warrington J.[7] held that no easement was created until the selection was made, and, since the selection might have taken place outside the perpetuity period, the reservation was void. He went on to hold that the positive covenant implied a negative promise not to interfere with the crossing. This was a " personal agreement not creating any interest in land," but which attached to the land as soon as the point was selected. This decision was affirmed by the Court of Appeal,[8] but the only available report states simply that the appeal was dismissed, and does not show whether the Court of Appeal accepted Warrington J.'s view on the perpetuity question. Again, therefore, the authority of this case is limited.

The third case bearing on this question is *Smith* v. *Colbourne*.[9] A clause in an agreement for the sale of land provided that the adjoining owner might enter and block up the windows of buildings on the land, if the owner of the buildings failed to do so. The Court of Appeal held that this clause created a revocable licence, and not an easement. Lord Cozens-Hardy M.R. and Swinfen Eady L.J. unambiguously stated,[10] however, that if it had created an interest in land, that interest would have been void for perpetuity. These statements are clearly *obiter*, but are nevertheless worthy of great respect.

These authorities are certainly not conclusive, but there does not seem to be any case which holds that the rule against perpetuities does not apply to easements. In view of this uncertainty, it is unfortunate that Cross J. in the instant case did not think it necessary to discuss the question. He states that " there is no doubt

6 (1911) 55 S.J. 423; [1911] W.N. 158 (C.A.).
7 (1911) 55 S.J. 423.
8 [1911] W.N. 158.
9 [1914] 2 Ch. 533.
10 [1914] 2 Ch. 533, at pp. 541 and 543, respectively.

that the rule against perpetuities applies to easements." [11] *Dunn's* case does not, therefore, give much assistance in answering this difficult question.

### Commencement of the easement

The second difficulty with which Cross J. had to deal was whether the grant in question was of an immediate right or of a right to arise in the future—the rule against perpetuities can clearly only apply to future rights, since it is a rule against remoteness of vesting. The grant in the *Associated Portland Cement* case [12] was held at first instance to have been of an immediate easement. In *Sharpe* v. *Durrant*,[13] on the other hand, it was held at first instance that no easement was created until the point for the crossing was selected. Cross J. remarked that it was not easy to reconcile these two decisions, but that he was not compelled to choose between them in this case. If the sewers which the plaintiff claimed to use had been constructed at the dates of the grants to her predecessors in title, she could, on the authority of the *Associated Portland Cement* case,[14] have succeeded. But no sewer had been built, and it was for the defendants, not the plaintiff, to decide if, and when, a sewer should be constructed. The plaintiff, therefore, had no present interest, but an interest which might spring up in the future. The learned judge went on to show that the grantees in the *Associated Portland Cement* case [14] had an immediate right to build a tunnel, which was exercisable from the date of the conveyance; they were not required to wait until the railway was built. In *Dunn's* case [15] the right could come into existence only when the sewers were built. *Dunn's* case [15] therefore resembles *Sharpe* v. *Durrant*,[13] where the right to select the points for the crossings and use the crossings when built could only come into existence in the future.

### Law of Property Act, 1925, s. 162

The plaintiff's next argument was that, if the grant was void at common law, it was saved by section 162 (1) (*d*) of the Law of Property Act, 1925.[16] *Dunn's* case appears to be the first decision on the interpretation of this paragraph of the Act, and is therefore of particular interest. Subsection (1) of section 162 reads: " For

[11] [1961] 2 W.L.R. 618, at p. 621; [1961] 2 All E.R. 62, at p. 65.
[12] [1910] 1 Ch. 12.
[13] (1911) 55 S.J. 423.
[14] *Supra.*
[15] *Supra.*
[16] This section was entirely new.

removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied. . . .

(*d*) to any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land for the purpose of—

(i) winning, working, inspecting, measuring, converting, manufacturing, carrying away, and disposing of mines and minerals;

(ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;

(iii) executing repairs, alterations, or additions to any adjoining land, or the buildings and erections thereon;

(iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works."

Comments on this subsection are very sparse. Morris and Leach [17] are content to print, without comment, the paragraph concerning easements. Presumably they thought that the language of the draftsman was clear enough. Wolstenholme and Cherry [18] state clearly that the subsection makes it possible to "reserve contingent and future rights." In Halsbury's *Statutes* [19] the only comment on paragraph (*d*) is that the right in issue in *Smith* v. *Colbourne* [20] would have been validated by sub-paragraph (iii) if it had been held to be an easement.

Cross J. refused to give the words of paragraph (*d*) (iv) the wide meaning claimed for them. He pointed out that sub-paragraphs (i), (ii) [21] and (iii) deal with rights of entry and easements which are ancillary to other grants of property. Sub-paragraphs (i) and (ii) presuppose that the grantee has some rights of minerals or timber which are not themselves void for perpetuity. Similarly, sub-paragraph (iii) assumes that the grantee has a valid interest in the adjoining land. Moreover, to construe sub-paragraph (iv) in the way suggested by the plaintiffs would lead to some odd results.

17 *Rule Against Perpetuities*, p. 222. Similarly, *Gale on Easements*, 13th ed., pp. 46–47.

18 *Conveyancing Statutes*, 12th ed., Vol. 1, p. 518.

19 Vol. 20, p. 770.

20 [1914] 2 Ch. 533.

21 In both the *Weekly Law Reports* and the *All England Reports* Cross J. is reported as having referred to paragraphs (*a*) and (*b*), stating that these concern rights ancillary to grants of minerals or timber. These paragraphs, and also paragraph (*c*), actually refer to indemnity rentcharges and indemnities against the payment of rent. Presumably Cross J. in fact referred to sub-paragraphs (i) and (ii) of paragraph (*d*).

Suppose, for example, that landowner B granted to landowner A that, if ever landowner B or his successors in title should construct a road from point X on the border of A's land to point Y on the other side of B's land, A and his successors in title should be entitled to use the road, and construct and use a drain running to it. It is fairly clear that at common law this grant would be entirely void, but, on the plaintiff's argument, the grant of the right of drainage would be saved by section 162, *i.e.*, he would be able to construct the drain, but would not be entitled to use the road. It is no doubt true that this is a curious result, but it is doubtful whether it can be avoided. The language used by the draftsman seems perfectly clear—the rule against perpetuities shall not apply " to any grant . . . of any easements . . . for the purpose of constructing, laying down . . . sewers . . . or other like works." There is no mention here, either expressly or by implication, of any other valid interest in land to which the right of drainage is merely ancillary, and it is very questionable whether such a meaning should be inferred simply because the other paragraphs and sub-paragraphs have this more limited meaning. The interpretation of section 162 (1) is worthy of consideration by a higher court.

For the purpose of the judgment, however, Cross J. was prepared to assume that the wider interpretation was correct. Even then, the plaintiff would not succeed, because she claimed not only to construct a sewer to join one laid down by the defendants, but also the right to use the sewer laid down by the defendants. Nothing in section 162 could save this right of user, which was void for perpetuity at common law. Cross J. rejected the plaintiff's argument that her only claim was to construct a sewer, and that she was not concerned with what happened to her sewage after it had reached the defendants' sewer. As he pointed out,[22] " the right to construct a drain to join the sewer would be useless to the plaintiff without the right to use the sewer." With this finding one can hardly argue—the section nowhere mentions an easement for the user of a sewer, and an intention to include user cannot be inferred. Paragraph (*d*) refers to " any grant, exception, or reservation of any right of entry on, or user of, the surface of land or of any easements, rights, or privileges over or under land. . . ." The word " user " seems to qualify the immediately following phrase " surface of land," since one does not usually speak of the user of " easements, rights, or privileges." But even if one were to allow the latter meaning, there is still no reference in sub-paragraph (iv) to the user of sewers, drains, etc. If the plaintiff were only claiming

[22] [1961] 2 W.L.R. 618, at p. 625; [1961] 2 All E.R. 62, at p. 67.

to use the drains which she constructed it might be possible impliedly to read this user into the sub-paragraph, but she also wanted to put her sewage into the defendants' drain, and clearly this is not covered by the language of the statute. This result seems inevitable, yet it is no less odd than that in the example given by the learned judge—the right to construct and maintain a sewer may be valid, but perhaps not the right to use it, and certainly not the right to use any sewer into which it runs. Since the result which follows from Cross J.'s interpretation of section 162 will be no more acceptable to conveyancers than that entailed by a literal reading, surely the best course would be to adopt the latter.

### Extent of easement

Since he gave judgment for the defendants on the first point, there was no need for Cross J. to consider the defendants' second argument. He did so, however, since his view on this point might be useful in the event of an appeal. He held that the grant should be construed against the grantor, and that there was nothing in the grant to show that the plaintiff's right should be restricted to land actually mentioned in the conveyances. If the easement had been valid, therefore, the plaintiff's argument would have succeeded, provided that (a) the sewer in question did not also pass under or over the land of a third party, and (b) the plaintiff would put into the sewer only a reasonable quantity of sewage, having regard to the sewer's other commitments.

### Practical difficulties

The decision in *Dunn's* case [23] may well create unforeseen difficulties for conveyancers, and defeat some easements granted in connection with building estates. Some precedents refer to the grants of easements over roads and sewers both existing and to be built in the future. For example, in Key and Elphinstone [24] a precedent of a conveyance of a plot of building land includes a grant of the use of " the drains or sewers made or intended to be made under the said streets and roads." Again, their chapter on " Parcels " includes [25] a grant of " the right at all times hereafter to use . . . all sewers, drains and watercourses now or hereafter made. . . ." [26] The effect of such a grant will now depend on

[23] *Supra.* [24] *Conveyancing Precedents*, 15th ed., Vol. 1, p. 795, note (*d*).
[25] *Ibid.*, p. 590, form 30.
[26] See also a similar form in the 1961 Supplement to the *Encyclopaedia of Forms and Precedents*, 3rd ed., p. 611; *cf.* Prideaux, *Conveyancing Forms and Precedents*, 25th ed., p. 699, where the right to light and air is expressly restricted to buildings erected within the perpetuity period.

whether the conveyance precedes the construction of the road or sewer—if the conveyance comes first, even by as little as one day, the easement will be void, as a result of this decision of Cross J. This position, which is highly inconvenient for conveyancers, can only be avoided by expressly restricting the creation of the easement to the perpetuity period, *i.e.*, twenty-one years, or a life in being (if such a life is specified) plus twenty-one years.

Further problems may well arise in fixing the limits of this decision. For example, suppose that A conveys to B a plot of land for building purposes, and A grants to B in general terms a right of drainage over A's adjoining land which he retains. B does not build for a number of years, but then selects a line of drainage, and claims to be entitled to the easement. B's claim may be attacked on two grounds: (a) perpetuity, and (b) uncertainty.[27] It may be argued that B's easement is created only when he selects the line of drainage, and that, since his selection may take place outside the perpetuity period, the grant is void *ab initio*. The case of *Sharpe* v. *Durrant* [28] lends support to this argument, for Warrington J. at first instance held that the right to cross the tramway did not arise until the points of crossing were selected by the vendor (the owner of the dominant tenement). A rather similar case, but involving a conveyance of land in fee simple, is *Savill Brothers, Ltd.* v. *Bethell*.[29] An estate was conveyed to a purchaser " except and reserving unto the vendor a piece of land not less than forty feet in width commencing at the point marked ' A ' on the plan, and terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from " other lands of the vendor. The position of the land excepted was not defined in any way. Subsequently, the purchaser prepared a plan showing a strip of land which satisfied these conditions. The Court of Appeal, affirming Buckley J., held that the exception was void for perpetuity, because the election might not be made until after the " nearest road " had been made, an event which might occur outside the period.[30] Against this argument, however, may be cited *South Eastern Railway Co., Ltd.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*,[31] where Swinfen Eady J. distinguished the *Savill Brothers* case [29] on the grounds that the agreement in issue was a reservation of an easement by the

[27] Although logically distinct, these two grounds are so closely connected in the cases that no attempt will be made here to keep them separate.
[28] (1911) 55 S.J. 423; [1911] W.N. 158.
[29] [1902] 2 Ch. 523. See also *Pearce* v. *Watts* (1875) L.R. 20 Eq. 492, especially *per* Jessel M.R. at p. 493.
[30] The reporter, in the headnote, questions whether uncertainty in a grant or exception can ever, after this decision, be cured by election.
[31] [1910] 1 Ch. 12.

railway company to the landowner, and not an exception out of the land granted by him to the company. There appears to be substance in this distinction. An exception is " a subtraction from what has previously been expressed to be granted of a part of the thing granted " [32]; but a reservation " can only be of something new out of the thing granted." [33] A reservation, unlike an exception, operates as a grant by the purchaser to the vendor,[34] and should, therefore, be construed against the grantor under the principle of no derogation from grant. One would expect the courts to look more liberally upon a reservation.[34a]

Furthermore, the learned judge pointed out, the agreement in this case was much less vague than the provision for accommodation works in *Sanderson* v. *Cockermouth and Workington Railway Co.*,[35] where a decree of specific performance was granted. The plaintiff agreed to sell to the railway company certain lands " subject to the making such roads, ways, and slips for cattle as may be necessary." Lord Langdale M.R. granted the decree, and referred the case to the Master to determine what works were necessary. On appeal the decision was affirmed by Lord Cottenham L.C. *Sanderson's* case [35] was also stronger than the *Associated Portland Cement* case [36] in that, in the earlier case, no power was given to either party to determine what was necessary, whereas, in the later case, the cement company was empowered to choose the site of the tunnel. This case seems to be fairly strong authority for the view that uncertainty in a reservation can be cured by election.

It is submitted that there is much to be said for the view of Swinfen Eady J. in the *Associated Portland Cement* case,[36] in that it accords better with the traditional approach of the courts towards reservations. This entails saying that *Sharpe* v. *Durrant* [37] is wrong on this point, but there are grounds, in any event, for thinking that the learned judge in that case was incorrect in holding that the easement arose only when the points for the crossings were selected. It might be argued that the easement was in fact created when the tramway was built, the precise site of the crossings remaining to be fixed by the plaintiff. If this is correct, then *Sharpe* v. *Durrant* [37]

[32] Gibson's *Conveyancing*, 18th ed., p. 195. [33] *Ibid.*

[34] Hence the old rule that a conveyance containing a reservation by the vendor must be executed by the purchaser in order to create a legal right: *May* v. *Belville* [1905] 2 Ch. 605. The rule was abolished by Law of Property Act, 1925, s. 65.

[34a] An exception is taken to be inserted for the benefit of the grantor, and must therefore be construed in favour of the grantee—Sheppard's *Touchstone*, 7th ed., p. 100; *Earl of Cardigan* v. *Armitage* (1823) 2 B. & C. 197; *Bullen* v. *Denning* (1826) 5 B. & C. 842, at p. 850.

[35] (1849) 11 Beav. 497; (1850) 2 H. & T. 327, at p. 331.

[36] *Supra.* [37] (1911) 55 S.J. 423; [1911] W.N. 158.

may be reconciled with the *Associated Portland Cement* case.[36] This argument leads, despite *Dunn's* case,[38] to the conclusion that an easement, the line of which is to be selected by the dominant owner, will be valid.

It is doubtful, however, whether the position will be the same if the power to select the line of the easement is vested in the owner of the servient tenement. There seems to be no direct authority on this point, but it is submitted that on principle no other conclusion is possible. The servient owner may not be under any duty to select the line, and he might never exercise his power. Can it be said that, in these circumstances, the dominant owner has an easement? Would it not be better to say that he had the mere possibility that an easement might spring up in his favour? There are indeed indications in this direction in some of the cases already discussed. For example, much of the reasoning of Swinfen Eady J. in the *Associated Portland Cement* case [39] seems to be based on the fact that the dominant owner had the power to select. In *Dunn's* case [40] Cross J. attached considerable importance to the fact that it was for the owner of the servient tenement to decide whether or not the sewer would be built. This, of course, is not quite the same point, but the effect of not building a sewer is exactly the same as failing to select a line for someone else to build a sewer. It is possible to infer, therefore, that the decision of Cross J. would have been the same if only the choice of the line of drainage had been left to the defendants.

In the absence of any decisive authority the answers suggested to these questions must necessarily be tentative, but it is submitted that these conclusions accord most naturally with principle and authority.

### Restrictive covenants

It is possible that the effect of *Dunn's* case [40] may be avoided in part by using a restrictive covenant. For example, a vendor, instead of reserving to himself a right to light for buildings to be erected in the future, may achieve substantially the same result by taking from the purchaser a covenant not to interfere with the access of light to such buildings. It seems that this restrictive covenant is *in futuro*, because it cannot possibly affect either the dominant or the servient tenement until the vendor builds. Whether such a covenant is affected by the rule against perpetuities is very

[38] [1961] 2 W.L.R. 618; [1961] 2 All E.R. 62.
[39] [1910] 1 Ch. 12, at p. 19.
[40] [1961] 2 W.L.R. 618, at p. 623; [1961] 2 All E.R. 62, at p. 66.

uncertain, and again the leading textbooks are not particularly helpful.[41] The fullest discussion seems to be in Elphinstone's *Covenants Affecting Land*,[42] where it is stated that the rule does apply to " an agreement to enter into a restrictive covenant affecting land." No authority for this proposition is cited, but apparently an analogy is drawn between restrictive covenants and options for a lessee to purchase the freehold, and it is well settled that such options are subject to the rule.[43] This statement covers all future restrictive covenants, and in particular will cover the covenant in the illustration given. This wide proposition is qualified, however, by the further statement that " a restrictive covenant, the benefit of which in its inception is validly annexed to land, so as to pass with the land, is not affected by the rule against perpetuities." This statement is based on a dictum of Farwell J. in *Muller* v. *Trafford*,[44] but Elphinstone himself suggests that it is wrong, because it means that " the right to defer annexation until a future sale would require to be limited to the perpetuity period." The real test, he submits, is whether the restrictive covenant is *created* within the perpetuity period, so as to confer a vested equitable interest on the covenantee. This amounts to saying that a distinction must be drawn between present and future covenants, and it is suggested that the validity of this distinction can hardly be disputed.

There are, it is true, some judicial statements which, on their face, appear to mean that the rule against perpetuities does not apply to restrictive covenants. The best known is that of Kay J. in *Mackenzie* v. *Childers*,[45] who, speaking of the decision of the Court of Appeal in *London South Western Railway Co.* v. *Gomm*,[46] said: " There is nothing in the case which gives the smallest ground for the contention that a covenant by a vendor or purchaser restricting the use of land reserved or sold is within the rule against perpetuity." The point at issue, however, was whether breach of a restrictive covenant could be restrained in perpetuity, and it is possible, therefore, that Kay J. was merely saying that a restrictive covenant may be enforced in perpetuity. If this is what the learned

41 In Morris and Leach, p. 222, the question is relegated to one sentence in a footnote. Gray, s. 279, discusses covenants immediately after easements, but, not following the good example set in his treatment of easements, fails to make what is thought to be the relevant distinction between immediate and future covenants. Preston and Newsom, *Restrictive Covenants Affecting Freehold Land*, 2nd ed., does not mention the problem.

42 Articles 10 and 12.

43 *Woodall* v. *Clifton* [1905] 2 Ch. 257.

44 [1901] 1 Ch. 54, at p. 61.

45 (1889) 43 Ch.D. 265, at p. 279. See also *Coles* v. *Sims* (1854) 5 De G.M. & G. 1; *Zetland* v. *Driver* [1939] Ch. 129.

46 (1882) 20 Ch.D. 562. The Court of Appeal reversed the decision of Kay J.

judge meant, then his statement is certainly correct, for the rule against perpetuities is a rule against remoteness of vesting, and the breach of a restrictive covenant does not result in the vesting of any interest in land.[47] But if Kay J. was referring to the creation of a restrictive covenant, then it is suggested, with great respect, that his statement is wrong, since a restrictive covenant is itself an interest in land.[48]

In any event, it may be argued that Kay J.'s treatment of the decision in *Gomm's* case [49] is open to question. It is true that the case itself was concerned with a positive covenant, but the dicta, and indeed the reasoning, of the court range much wider, and appear to include all covenants creating an interest in land. Sir George Jessel M.R. said [50]: "Whether the rule applies or not depends on this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule. . . . But if it binds the land it creates an equitable interest in the land. . . . It appears to me . . . that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognised exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period." It is surprising that Kay J. claimed to find in *Gomm's* case [49] justification for making precisely the kind of distinction which Sir George Jessel refused to countenance.

A further argument in favour of the view that restrictive covenants are obnoxious to the rule is that they are very closely analogous to easements.[51] The equitable interest is in various ways less extensive than a legal easement,[52] but the insistence of equity on the continued existence of a dominant and servient tenement shows how close is the analogy. If easements, therefore, are subject to the rule against perpetuities, there seems to be no good reason why restrictive covenants should not be equally amenable to it.

The only remaining objection to this argument is the decision of Warrington J. in *Sharpe* v. *Durrant*,[53] where, it will be remembered, it was held that the implied covenant not to interfere with the user of

[47] The other statements, *supra*, note 45, also, apparently, refer to the breach of a covenant.
[48] *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391, at p. 396.
[49] (1882) 20 Ch.D. 562.
[50] *Ibid.*, at pp. 580–581.
[51] *Gomm's* case, *supra*, at p. 583, *per* Jessel M.R.; Hanbury, *Modern Equity*, 7th ed., p. 393.
[52] For example, it must be negative, and is now registrable as a land charge: Land Charges Act, 1925, s. 10.
[53] (1911) 55 S.J. 423, *supra*.

the crossings was " a personal agreement not creating any interest in land," but attaching to the land as soon as the points for crossings were selected. This case is of doubtful authority for a number of reasons already discussed,[54] and it is suggested that this part of the decision cannot be supported. The plaintiff was attempting to enforce the covenant against a purchaser of the servient tenement, and was therefore claiming to be entitled to an interest in land. Moreover, if the covenant attached to the land only when the site of the crossings was selected, this was an interest in land springing up in the future, and ought to have been declared void for perpetuity. If the easement, a legal interest in land, was void, it is difficult to understand why the equitable restrictive covenant was not struck down in the same way.

It is suggested, therefore, that the rule against perpetuities does apply to the creation of restrictive covenants, as it applies to the creation of any other interest in land. The effect of *Dunn's* case,[55] it appears, cannot be avoided by framing a positive right as a covenant not to interfere with that right.

### Return to principles

This discussion has shown, it is hoped, that the rule against perpetuities applies to the creation of any interest in land. It is suggested, however, that the decision to extend the rule to rights merely ancillary to land, which are often granted in commercial transactions, was an unfortunate step. The logic is impeccable, but the policy considerations underlying the rule are ignored. Its purpose is to prevent excessively long family settlements, and thus make the land fairly freely alienable. For this purpose, the period chosen, a life in being plus twenty-one years, is very appropriate, since, in the early years of the rule's history, this would represent the life of the tenant for life plus the minority of his eldest son.[56] But this period has no relevance whatever to the dealings of commercial men, and it is questionable whether the same rule should be applied rigorously to their quite different transactions. Moreover, the rule was originally aimed against unreasonable fettering of the land itself; the same dangers do not attend the possibly remote creation of an interest ancillary to land, such as an option to purchase, an easement and a restrictive covenant. Finally, the rule is now generally used by the grantor of an easement or other interest as a means of escape from his obligation; he is able to ride

[54] *Supra*, pp. 422–424. [55] *Supra*.

[56] Later, of course, the rule became more general, and it was settled by the decision of the House of Lords in *Cadell* v. *Palmer* (1833) 1 Cl. & F. 372, that the period of twenty-one years had no reference to any actual minority.

free by a mere technicality, which, presumably, neither the parties nor their advisers foresaw. In these circumstances "the rule becomes a destroyer of bargains which in all conscience ought to be performed," a situation "which does not appeal to the common sense of business men or the ethical sense of anyone."[57] A grant of land is commonly made only on the assumption that the vendor may reserve certain rights over the land sold; if the law says that all such rights are void if they are to take effect over something not yet in existence, or if they are not precisely defined, then the law simply brings itself into disrepute, and can hardly claim to be furthering the public policy which is supposed to underlie the rule against perpetuities.[58]

[57] Morris and Leach, *Rule Against Perpetuities*, p. 217. In *Knightsbridge Estates Trust, Ltd.* v. *Byrne* [1939] Ch. 441, the Court of Appeal effectively demonstrated, in another context, the dangers of the law's interfering in commercial bargains freely entered into.

[58] It is unfortunate that the Law Reform Committee in their Fourth Report (1956, Cmnd. 18) did not consider the application of the rule to easements and restrictive covenants. They did consider its application to options, and made the valuable recommendations that a leasehold option should be exercisable at any time during the lease, but an option in gross should be restricted to twenty-one years, even between the contracting parties.

## NOTES OF RECENT CASES

### 1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

*Barclays Bank, Ltd.* v. *Kiley and another* [1961] 1 W.L.R. 1050; [1961] 2 All E.R. 849 (Ch.D.)

*Mortgage—restriction on statutory power of leasing—construction of mortgage—appointment of receiver.*—In 1948 M. L. charged registered land to the plaintiff bank, which, it was conceded, had protected its priority under the Land Registration Act, 1925. The charge provided that any demand might be made on the mortgagor " by letter sent by post addressed to me " at his last known address, and that if the context permitted reference to the mortgagor included references to his executors, administrators and successors in title; the charge (*inter alia*) also excluded the statutory power of leasing contained in the Law of Property Act, 1925, s. 99, unless exercised with the written consent of the bank, and provided that the statutory power of appointing a receiver might be exercised at any time after default on a demand for payment. In 1957 M. L. purported to grant a tenancy of part of the premises to the second defendant, S. In August 1959 M. L. died but no representation to his estate was taken out. One S. P. appeared to be managing the property and in November 1959 he purported to grant a lease to the first defendant, K. In February 1960 the bank demanded payment by a letter addressed to M. L. at the property and in March 1960 appointed a receiver. The receiver notified the tenants of his appointment but never accepted rent; he did subsequently, however, agree to the tenants doing certain repairs and paying some outgoings out of rent they had in hand. The bank claimed possession.

Prima facie, of course, the mortgagees were not bound by the tenancies (*Dudley and District Benefit Building Society* v. *Emerson* [1949] Ch. 707) unless by words or conduct a fresh relationship of landlord and tenant had been created (see, for example, *Doe* d. *Parry* v. *Hughes* (1847) 9 L.T.(o.s.) 82; *Taylor* v. *Ellis* [1960] Ch. 368 and *Lever Finance Co., Ltd.* v. *Needleman's Trustee* [1956] Ch. 375). Pennycuick J. held (1) the action was validly constituted without joining a representative of the mortgagor, especially as success by the bank could only enhance the value of the property by removing protected tenants (following *Alliance Building Society* v. *Shave* [1952] Ch. 581 and *Hughes* v. *Waite* [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603).

(2) On construction of the mortgage, the demand for payment was validly made, even after the death of the mortgagor. The bank was not to be rendered powerless unless it procured a grant of representation. (On this point no direct authority could be found, though the

learned judge referred to *New Zealand Gold Extraction Co.* (*Newbery Vantin Process*) v. *Peacock* [1894] 1 Q.B. 622, a case concerned with shares.) The consequence of this holding, it was conceded, was that the receiver was agent of the mortgagor. Here one may contrast the result in *Lever Finance Co., Ltd.* v. *Needleman's Trustee, supra.*

(3) If the above holding was wrong, so the receiver was agent for the bank, then on the facts the receiver had not by his action created the relationship of landlord and tenant between the bank and the defendants, distinguishing *Doe* d. *Parry* v. *Hughes, supra.*

Consequently the usual order for possession in twenty-eight days was made in favour of the bank.

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*Marten and another* v. *Flight Refuelling, Ltd. and another*

[1961] 2 W.L.R. 1018; [1961] 2 All E.R. 696 (Ch.D.)

*Restrictive covenant — enforceability — annexation of benefit — evidence available—user under statutory powers.*—In this case the first plaintiff was the wife of Commander Marten of Crichel Down fame; the Air Ministry represented by the Attorney-General was the second defendant; and after a meticulously fought action Wilberforce J. delivered a reserved judgment occupying some twenty pages in the reports. One rather expects, therefore, to hear more of the matter, but nevertheless a full note now seems desirable.

In 1943 the second plaintiffs, who were then special executors under the Settled Land Act, 1925, holding the Crichel estate in trust for the first plaintiff, then an infant tenant in tail, conveyed to D. R. H. in fee simple a farm of some 562 acres of which 200 acres thereof (the "blue land") were under requisition by the Air Ministry. D. R. H. covenanted with "the vendor and its successors in title" [*sic*] not to use the conveyed land for anything other than agricultural purposes unless the vendor should (*inter alia*) sell "all or any part of its land immediately adjoining or adjacent" for non-agricultural purposes, when the purchaser should be entitled to similar latitude. This covenant was duly registered under the Land Charges Act, 1925, s. 10 (1), Class D (ii). In 1947 the Air Ministry permitted the first defendant, F. R., Ltd., to occupy the land on terms comparable to those of a tenancy. (It may be noted that no tenancy proper was possible because a requisitioning authority does not have an estate in the land—*Ministry of Agriculture and Fisheries* v. *Matthews* [1950] 1 K.B. 148.) In 1950 Mrs. Marten attained full age and disentailed, and the Crichel estate was conveyed to her in fee simple. In 1954 the Air Ministry compulsorily purchased most of the servient land, still occupied by F. R., Ltd., from D. R. H.'s executors, subject to the covenant, though a small portion, called the "communal site," remained under requisition till after the start of the present action and was therefore unaffected by the decision. In 1955 the Air Ministry compulsorily purchased part of the Crichel estate adjoining the blue land, free from any restriction, and it was occupied by F. R., Ltd. F. R., Ltd. carried on industrial work, partly

for the Air Ministry and other services and partly for itself. The plaintiffs sought a declaration and enforcement of the covenant against F. R., Ltd., the Air Ministry later being added as a defendant.

A number of legal points fell for decision.

1. The first question was whether the land to be benefited could be sufficiently identified. Wilberforce J. held that extrinsic evidence could be admitted for this purpose. He relied principally on the statement of the Court of Appeal in *Re Union of London and Smith's Bank, Ltd.'s Conveyance, Miles* v. *Easter* [1933] Ch. 611, at p. 631 that the existence and situation of such land must be indicated in the conveyance or otherwise shown with reasonable certainty, and added "the natural interpretation to place on these latter words is first that they may be so shown by evidence *dehors* the deed and secondly, that a broad and reasonable view may be taken as to proof of the identity of the lands. This general approach would, I think, be consistent with the equitable origin and character of the enforcement of restrictive covenants" ([1961] 2 W.L.R. 1018, at p. 1025; [1961] 2 All E.R. 696, at p. 703). The learned judge also cited similar statements from *Roger* v. *Hosegood* [1900] 2 Ch. 388, at p. 407 and *Formby* v. *Barker* [1903] 2 Ch. 539, at p. 550, and "welcomed as a useful guide" the like decision in *Newton Abbot Co-operative Society, Ltd.* v. *Williamson and Treadgold, Ltd.* [1952] Ch. 286 which had been strongly attacked in argument by the Attorney-General. He then held that the extrinsic evidence available amply showed the Crichel estate to be a special agricultural unit well capable of benefiting by the covenant.

Wilberforce J. declined to hold that a recital in the conveyance of 1943 of a vesting deed made in 1928, which referred to the Crichel estate, made it possible to identify the dominant land from the terms of the conveyance, saying that the recital was not concerned with the covenant and in any event did not refer to the land held in 1943. It is perhaps surprising that in this connection no argument was, apparently, based on the reference (quoted above) in the covenant to the vendor's adjoining or adjacent lands; the words there are not unlike those which in the common law covenant case of *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500 were held to fall within the maxim *certum est quod reddi potest*. Incidentally this case, it is suggested, provides further support for the instant decision.

If this case goes further, therefore, the Court of Appeal will be faced with two decisions establishing in this connection an exception to the general rules for the construction of deeds. Of course there has been a good deal of criticism of the *Newton Abbot* decision, which will now no doubt be reiterated. Wilberforce J. dismissed briefly the argument that subsequent purchasers of servient land would not be able to ascertain by whom covenants were enforceable if at all, saying that in any action an assign of the benefit must prove his right to sue; with respect, the point is rather whether a proper investigation of title can be made and how requisitions should be framed.

2. Wilberforce J. also dismissed briefly a "remarkable" argument that the covenant was void for perpetuity because it could not operate until requisition ended—an uncertain date. He held the covenant

became effective at once, but was unenforceable as regards the blue land. Fortunately the draftsman did not provide for the latter point; had he expressed the covenant in such terms that it became operative only on derequisition (the true position) the rule against perpetuities would, it seems, have been offended—compare *Dunn* v. *Blackdown Property, Ltd.* [1961] 2 W.L.R. 618; [1961] 2 All E.R. 62, noted *ante*, p. 351.

3. The learned judge also considered and rejected a number of arguments designed to show that the Crichel estate could not actually benefit from the covenant, saying that if a covenant was taken bona fide the court would and could rarely substitute any other standard for that of the parties. Moreover the evidence called in fact proved benefit.

4. The title of the plaintiffs was next considered, for the assent in favour of Mrs. Marten in 1950 did not mention the covenant. Here Wilberforce J. held, following *Lord Northbourne* v. *Johnston & Son* [1922] Ch. 317, that the plaintiffs were together entitled to the whole legal and equitable benefit of the covenant and so could sue. The important point here would seem to be that the special executors had always held the benefit of the covenant on trust for Mrs. Marten and so sued as trustees; as original covenantees simply, in the absence of a trust, they could not have sued an assign of the covenantor after parting with all their land (*Chambers* v. *Randall* [1923] 1 Ch. 149). The *Newton Abbot* case, *supra*, also illustrates devolution of the benefit of a covenant through executors.

5. The burden of the covenant was held to bind the blue land under the ordinary conveyancing rules contained in the Land Charges Act, 1925, and the Law of Property Act, 1925, s. 198 (1), neither the Air Ministry nor F. R., Ltd., being purchasers for value without notice. (F. R., Ltd. were, of course, in a position somewhat similar to that of the squatters in *Re Nisbet and Potts' Contract* [1906] Ch. 396.) Wilberforce J. said the covenant bound the land even if the remedy by action was presently not available, citing *Re Simeon and Isle of Wight R. D. C.* [1937] Ch. 525 and distinguishing the frustration case of *Bailey* v. *de Crespigny* (1869) L.R. 4 Q.B. 180. He further held that the compulsory sale in 1955 of further land free from restriction to the Air Ministry did not bring into operation the proviso to the covenant (see *supra*) so as to determine the covenant.

6. Finally, Wilberforce J. examined fully and carefully the issue of enforcement, which he described as the most difficult part of the case ([1961] 2 W.L.R. 1018, at p. 1035; [1961] 2 All E.R. 696, at p. 710). Here, however, we pass from conveyancing to administrative law and may summarise. In short, the learned judge held that the court could not interfere with any user based on statutory authority, whether undertaken directly by the Air Ministry or through the medium of F. R., Ltd., applying *Hawley* v. *Steele* (1877) 6 Ch.D. 521. The court had to adopt a broad approach and "take great care not to embark upon inquiries or to make distinctions in a matter which is essentially for the administrative discretion of the Government" ([1961] 2 W.L.R. 1018, at p. 1039; [1961] 2 All E.R. 696, at p. 717). As regards the independent activities of F. R., Ltd., however, there was no such statutory protection and Wilberforce J. granted an injunction. In so doing—and here we return to conveyancing—he took

account in relation to two buildings of the fact that the plaintiffs had not, prior to the action, relied on the covenant in their negotiations with F. R., Ltd., which had of course constructive but not actual notice. The learned judge therefore applied fairly strictly the maxim "he who seeks equity must do equity."

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*Re Royal Victoria Pavilion, Ramsgate* [1961] 3 W.L.R. 491; [1961] 3 All E.R. 83 (Ch.D.)

*Restrictive covenant—construction—whether intended to run with land or be purely personal—"contrary intention" within Law of Property Act*, 1925, *s.* 79.—Before any covenant relating to land can be enforced by or against a successor in title of the covenantor or covenantee, it is necessary to show that the covenant is one which can run with the land, as opposed to being purely personal to the original parties. This problem frequently arises in connection with covenants contained in leases; the books give lists of covenants which have been held to fall on one side or other of the line (see, for example, Woodfall, *Landlord and Tenant*, 26th ed., Vol. I, pp. 543–548), but the rule is equally applicable to positive or negative covenants imposed on the sale of land (*Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, at p. 506; *Zetland* v. *Driver* [1939] Ch. 1, at p. 7). One point to be considered is whether the parties intend the covenant to run, a matter which has to be determined by consideration of the language used in the relevant document in accordance with the ordinary rules of construction.

In the instant case a vendor company (Thanet Theatrical, Ltd.) in 1952 conveyed to the defendant company two freehold and two leasehold properties, all situated in Ramsgate and all used in the entertainment and catering business. The vendor company was then entitled also to a lease with seventeen years unexpired of the Royal Victoria Pavilion, Ramsgate. The conveyance of 1952 contained three relevant covenants. By clause 4 the purchasers "for themselves and their successors and assigns" covenanted to observe certain existing covenants and to indemnify the vendors against future breaches; by clause 5 (the covenant in dispute) the vendors [simply] covenanted to "procure" that until March 1969 (when the lease expired) the Royal Pavilion would be put only to certain stated limited use; by clause 6 the vendors covenanted to indemnify the purchasers against various business liabilities already accrued. The lease of the Royal Pavilion was now vested in the plaintiff by assignment, and the defendant still retained one of the four properties conveyed in 1952. The vendor company was wound up in 1957. The defendant sought a declaration that the covenant in clause 5 above was not binding on it. Pennycuick J. had no hesitation in holding the covenant in clause 5 purely personal and therefore not binding on the plaintiff as assignee. He held first that the word "procure" was appropriate only to a personal relationship—"the covenantor under a covenant intended to run with the land would not sensibly be expressed as procuring his successors to abstain from doing whatever is covenanted not to be done" ([1961] 3 W.L.R. 491, at p. 495;

[1961] 3 All E.R. 83, at p. 86). Secondly, Pennycuick J. pointed out that in clause 4, where the covenant was clearly intended to run, the words " for themselves their successors and assigns " were used, whereas these words were omitted in clause 6, clearly intended as a personal covenant. Consequently it was to be assumed that the draftsman knew what he was doing in clause 5, where the words were also omitted. (Compare *Re Union of London and Smith's Bank, Miles* v. *Easter* [1933] Ch. 611, at pp. 623, 635.) Thirdly, the learned judge rejected an argument based on the Law of Property Act, 1925, s. 79 (1), whereby " unless a contrary intention is expressed " covenants are deemed to be made on behalf of successors in title, saying: " The words ' unless a contrary intention is expressed ' mean rather: unless an indication to the contrary be found in the instrument, and that such an indication may be sufficiently contained in the wording and context of the instrument even though the instrument contains no provision expressly excluding successors in title from its operation " ([1961] 3 W.L.R. 491, at p. 496; [1961] 3 All E.R. 83, at p. 87), and referring to two cases decided on similar words in the Conveyancing Act, 1881, s. 6, now the Law of Property Act, 1925, s. 62—*Broomfield* v. *Williams* [1897] 1 Ch. 602 (C.A.) and *Gregg* v. *Richards* [1926] Ch. 521 (C.A.). Lastly, Pennycuick J. said that, had it been necessary, he would have applied *Newton Abbot Co-operative Society, Ltd.* v. *Williamson and Treadgold, Ltd.* [1952] Ch. 286, and held the covenant benefited the defendant's land, not merely its business.

This decision, like *Marten* v. *Flight Refuelling*, noted above, emphasises the importance in relation to covenants of clear drafting based on clear instructions. Without in any way questioning the correctness of the application in this case of the rules for the construction of deeds, one may doubt whether the real intention of the parties to the 1952 conveyance was achieved, if indeed an agreed intention ever existed.

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*Cook* v. *Cook* [1961] 3 W.L.R. 432; [1961] 2 All E.R. 791 (P.D.)

*Matrimonial home — jurisdiction to exclude spouse after decree nisi.*—In this case a wife sought an injunction excluding her husband from the " matrimonial home " prima facie belonging to him. In June 1959 the wife petitioned for divorce on the ground of cruelty and in November 1960 obtained a decree nisi. Between the date of the petition and the present hearing (March 1961) the husband and wife had continued to live under the same roof; the husband had given undertakings not to molest his wife and had been guilty of several substantial breaches thereof. On advice, the wife had in January 1960 issued a summons seeking variation of a post-nuptial settlement (see Matrimonial Causes Act, 1950, s. 25) which she alleged had been created by the contribution she had made to the purchase of the matrimonial home in her name; she further deposed by affidavit that if this variation was granted she (and with her the children of the marriage) expected to be able to remain in the matrimonial home.

Lloyd-Jones J. held first that jurisdiction to exclude a husband from the matrimonial home was not determined by decree nisi, but

continued to exist at least until decree absolute. On this point there was no previous authority, and the learned judge referred to *Rayden on Divorce*, 8th ed., p. 495, para. 35—*Silverstone* v. *Silverstone* [1953] P. 174 and *McDowell* v. *McDowell* (1957) 107 L.J. 184. See, too, *Gorulnick* v. *Gorulnick* [1958] P. 47. He then decided that on the particular facts an injunction should be granted until the decree was made absolute.

Once it was accepted—as Lloyd-Jones J. did accept—that the wife had a genuine case to be adjudicated in connection with the property, it was clearly desirable, it is submitted, that she should not be bullied out of it. Litigants must await and abide by the decision of the court. On this reasoning decree absolute should not necessarily make any difference if an application is outstanding under the Married Women's Property Act, 1882, s. 17, or under the Matrimonial Causes Act, 1950, s. 25. So far as property rights are concerned, the implication that any contribution by a spouse creates a settlement under section 25, *supra*, should, it is submitted, be treated with caution; *Brown* v. *Brown* [1959] P. 86, noted *ante*, Vol. 23, at p. 30, certainly did not go so far.

## 2. *TRUSTS*

*Young* v. *Young* [1961] 1 W.L.R. 952; [1961] 2 All E.R. 843 (Ch.D.); on appeal [1961] 7 C.L. 527d. (C.A.)

*Variation of settlement — whether post-nuptial — Matrimonial Causes Act*, 1950, *s.* 25.—A somewhat tangled skein in the law of matrimonial property was here unravelled first by Baker J. in a reported decision and subsequently in the contrary sense by the Court of Appeal in a decision available at the moment of writing only in *Current Law*.

In May 1945, between decree nisi and decree absolute, the respondent husband agreed to pay annuities by monthly payments to the petitioner wife and the children of the marriage (until they attained the age of sixteen or left school), in consideration of the wife's covenant to accept these sums in satisfaction of her claim to maintenance. Three payments were made before decree absolute, and thereafter until May 1957, when the husband learned that his wife had in 1956 remarried in Australia. In May 1957, as a result of the decision in *Bennett* v. *Bennett* [1952] 1 K.B. 249, the agreement was void and unenforceable as an attempt to oust the jurisdiction of the court. However, in August 1957 the Maintenance Agreements Act, 1957, came into force. This Act validated all such agreements whether made before or after the Act (s. 1 (1) (2) ), but permitted arrears to be claimed only in respect of periods after the commencement of the Act (s. (1) (2) ); the Act also permits the court to vary such agreements if the parties thereto are for the time being both domiciled or both resident in England (s. 1 (3) ). The wife recovered some arrears hereunder, and the Court of Appeal in an unreported decision held section 1 (3) above inapplicable because the wife was neither domiciled nor resident in England. Consequently the husband

now asserted that the agreement constituted a post-nuptial settlement and applied for variation under the Matrimonial Causes Act, 1950, s. 25. The question was whether the adjective "nuptial" could be applied to this arrangement so as to bring it within the Act of 1950. Baker J. held that it could, citing definitions and dicta from *Worsley* v. *Worsley and Wignall* (1869) L.R. 1 P. & D. 648, *Bosworthick* v. *Bosworthick* [1926] P. 161, *Prinsep* v. *Prinsep* [1929] P. 225 and *Lort-Williams* v. *Lort-Williams* [1951] P. 395 and relying especially on *Melvill* v. *Melvill and Woodward* [1930] P. 159, where the jurisdiction was held to extend to a settlement made after petition but before decree under which not only the wife but also children benefited —as in the instant case.

However, the Court of Appeal (Ormerod, Upjohn and Davies L.JJ.) reversed this decision, taking the view that an arrangement contemplating dissolution rather than continuance of the marriage could not be said to have a nuptial element.

In these days of easy movement the restriction on jurisdiction imposed by section 1 (3) of the Maintenance Agreements Act, 1957, may cause hardship; here Baker J.'s view is attractive. On the other hand, having regard to the House of Lords' decision in *Fender* v. *Mildmay* [1938] A.C. 1, it would then have been possible, between decree nisi and decree absolute, for two spouses, each lawfully engaged to marry a third person, to make a post-nuptial settlement *inter se*. The Court of Appeal has prevented that absurdity. Yet, in the end, has not bad law made a hard case?

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*Re Seale's Marriage Settlement* [1961] 3 W.L.R. 262; [1961] 3 All E.R. 136 (Ch.D.)

*Variation of trusts—beneficiaries domiciled and resident abroad—substitution of Canadian for English settlement—Variation of Trusts Act*, 1958.—By a marriage settlement made in 1931 certain investments were to be held on trust for the wife for life, thereafter for the husband for life on protective trusts and subject thereto for the children or remoter issue of the marriage as the husband and wife jointly or the survivor alone might appoint and in default for the children equally on attaining twenty-one or if female on marriage. In 1931 the husband and wife were domiciled and resident in England but were now domiciled and resident in Canada. There were three children of the marriage, one of whom had attained twenty-one. This state of affairs gave rise to some administrative difficulties and to substantial financial disadvantages by reason of double taxation. An application was therefore made under the Variation of Trusts Act, 1958, for approval of an arrangement whereby, in effect, a Canadian settlement with a Canadian trust corporation as trustee and with Canadian investments should be substituted for the English settlement, the terms of the new settlement being as like those of the existing one as permitted by the law of Quebec.

Buckley J., sanctioning the arrangement, observed that something more than variation of trusts was involved, but pointed out that the Variation of Trusts Act, 1958, authorises approval of revocation as

well as variation. Moreover, there were a number of earlier cases showing that in particular circumstances of the sort existing here the court had authorised appointment of trustees out of the jurisdiction and the removal of trust property (citing *Re Liddiard* (1880) 14 Ch.D. 310; see also *Re Simpson* [1897] 1 Ch. 256 (C.A.) and *Re Freeman's Settlement Trusts* (1888) 37 Ch.D. 148—a more cautious approach). Buckley J., however, objected to a proposed restraint on alienation applicable to the children unless it could be shown to be for their benefit; in fact it was deleted.

The broad view here taken of the jurisdiction conferred by the Variation of Trusts Act, 1958, is to be welcomed, for in the present age the law should be able to deal competently with circumstances of the sort that arose here. On the facts, too, one may note that the beneficiaries obtained far less control of the funds than in the not infrequent cases where the court has authorised a division of capital.

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*Re du Cros' Settlement* [1961] 3 All E.R. 193 (Ch.D.)

*Settlement—construction—" male issue " and " male descendants."* —Most problems of construction of terms creating family endowment arise in connection with wills. This case is a reminder that the problems may equally stem from *inter vivos* settlements, and also that ancient rules may be revitalised by the use of appropriate technical terms.

By a family settlement made *inter vivos* in 1936 the relevant portion of the trust fund was to be held (a) as to half thereof in trust during a " royal lives " perpetuity period (in which the lives were King George V and his issue alive in 1936) to divide the income among such of the brothers of the settlor as should be for the time being living and the male issue for the time being living of such brothers as should be dead, (b) as to the other half in trust during the same perpetuity period to divide the income among such of the male descendants of H. du C. (father of the settlor) as should be actively engaged in a family business, but so that any income which the trustees thought not needed for this purpose should be added to the other half, and (c) at the end of the perpetuity period to divide the capital among the male descendants of H. du C. then living and aged twenty-one. The questions for decision were whether the words " male issue " and " male descendants " were restricted to males descended through males, or included also males descended through females.

Pennycuick J. held, first, that there was nothing to displace the general prima facie rule that " issue " connotes descendants in all degrees, noting in particular that consistency required the word, when used twice in the same paragraph, to have the same meaning in the perpetuity clause as in the beneficial provisions, and also that the latter might be expected to be such as could last for the perpetuity period defined. The considerable influence here attributed to a formal perpetuity clause should therefore be borne in mind.

Secondly, Pennycuick J. held that the term " male issue " could not be differentiated from " issue male " which it was established was

a technical expression meaning males descended through males unless a contrary intention could be established (citing *Lambert* v. *Peyton* (1860) 8 H.L.C. 1; *Lywood* v. *Kimber* (1860) 29 Beav. 38 and an Australian decision *Allen* v. *Crane* (1953) 89 C.L.R. 152). Here no such intention could be found.

Thirdly, the learned judge held that " male descendants " was not a term of art but of ordinary speech which would normally include males descended through females. This view was supported first by the supposition that the different expressions " male issue " and " male descendants " were intended to have different meanings by the settlors, and second, that a gift to persons concerned with a business would presumably be intended to include all active males. " The position is quite different from that which arises where a settlor or testator is apparently intending to keep an estate in the male line of his family " ([1961] 3 All E.R. at p. 198).

Pennycuick J. then considered the authorities, which were confused; in *Oddie* v. *Woodford* (1821) 3 My. & Cr. 584 Lord Eldon L.C., in holding " male lineal descendants " restricted to males claiming through males, had apparently implied a wider meaning for " male descendants " *simpliciter,* but nevertheless in *Bernal* v. *Bernal* (1838) 3 My. & Cr. 559 and *Thellusson* v. *Lord Rendlesham* (1859) 7 H.L.Cas. 429 and in *Allen* v. *Crane, supra,* the view was taken that " male descendants " meant only males claiming through males. However, Pennycuick J. was able to adhere to his prima facie view on a construction of the will as a whole.

It may be noted that Pennycuick J. was not asked to construe and did not refer to the meaning of the words " male descendants " in the ultimate gift of capital, but one may assume the expression to have the wide meaning above attributed. In that event the illogical result is that sons, grandsons, etc., of the settlor's nieces can take no share of income unless engaged in the family business, but nevertheless those that are then alive take a share of capital at the end of the perpetuity period; moreover, any surplus from the business half of the income was to go to the family half. Nor, in fact, was there apparently any family estate here, despite the remarks of the learned judge above cited. With respect, might not these considerations lead to the conclusion that " male issue " should have in this settlement the same wider meaning as " male descendants "? Perhaps some support from the earlier law might be found by analogy with the somewhat obscure doctrine of " very heir," whereby under a limitation to the " male heir of the body " by purchase, a son of a daughter could take if also the general heir. (See *Jarman on Wills,* 8th ed., pp. 1547 *et seq.*, and especially an article, " Shelley's Case and the Doctrine of Very Heir," by R. E. Megarry, Q.C., at (1948) 59 L.Q.R. 272–275.) In *Re Routledge* [1942] Ch. 457 it was conceded that the son of a daughter was entitled under a gift (by words of purchase) to " the heirs male of the body of X living at his decease."

## 3. *CHARITIES*

By J. T. Farrand, ll.b., Solicitor

*Re Mead's Trust Deed* [1961] 2 All E.R. 836 (Ch.D.)

*Public benefit—trust to provide a home both for any convalescent members and for poor aged members of a trade union—whether section of the public—Charitable Trusts (Validation) Act,* 1954.—In 1920, land was conveyed to the trustees of a trust deed with the object of setting up a home as a war memorial. The purchase price of the land and the funds for setting up the home were largely contributed by a trade union whose membership comprised only but not all persons engaged in the printing industry. According to the trust deed the home was intended to provide members of that union with (i) a sanatorium for consumptive patients; (ii) a convalescent home; and (iii) a home for aged members no longer able to support themselves and their wives. In fact, no sanatorium was erected, it being found fortunately unnecessary. By the trust deed, the trustees were to act in accordance with the directions of the executive council of the union. Recent proceedings between the trustees and the rating authorities as to the application of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955 (*i.e., Isaacs* v. *Market Bosworth R. D. C.* [1960] 1 W.L.R. 277) gave rise to the incidental question of whether the objects of the trust deed were charitable, and Cross J. was asked for a declaration on this point.

The learned judge considered first whether the trust was charitable apart from the Charitable Trusts (Validation) Act, 1954. In his view, the objects of the trust deed would clearly be charitable but for the fact that the members entitled to occupy the sanatorium and convalescent home, unlike the home for aged members, need not necessarily be poor. It is well settled that with the one exception of relief of poverty a trust to be charitable must be for the public benefit. However, it was submitted—by the Attorney-General, the union being anxious to end the trust and make a fresh start—that the members of a trade union might be a section of the public for this purpose. Cross J. said "I always find the question whether or not the common characteristic which is shared by a number of persons is or is not such as to make them a section of the public, and not a fluctuating body of private individuals, very difficult. There appears to be no principle by reference to which it can be answered" ([1961] 2 All E.R. 836, at p. 840). As a question of fact, therefore, he then proceeded to identify the union with a company employing most but not all of the persons engaged in a particular industry and applied to the members of the former the opinion of Lord Simonds in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] A.C. 292, at pp. 307, 308, that the employees of the latter however numerous could never form a section of the public. He further attached importance to the element of self-help present in the relationship between the members of this union and the trust.

Having answered the question whether the trust was charitable in the negative, Cross J. considered the effect of the Charitable Trusts

(Validation) Act, 1954. The Attorney-General had submitted that this was an "imperfect trust provisison" within section 1 (1) of that Act in that the trustees could consistently with the terms, albeit not the spirit, of the trust use the trust property exclusively for charitable purposes by restricting admission to any branch of the home to poor members of the union. The learned judge accepted this submission, although noting that the operation was far more drastic than that performed by Buckley J. in *Re Wykes' Trusts* [1961] 2 W.L.R. 115, *ante*, p. 164, on a "benevolent or welfare fund" since here the result would almost certainly be contrary to the intentions of the settlors (*i.e.*, the union and its members). He rejected the common-sense submission that since the trustees were bound by the directions of the executive council there was really only a trust for the purposes of the trade union on the ground that the executive council had a fiduciary capacity so far as the trust property was concerned.

Thus the union, having set up (perhaps for fiscal reasons) an invalid trust which (perhaps for other fiscal reasons) it now wanted to end, to its chagrin saw the trust validated by Parliament in a form contrary even to its original intentions. Cross J. thought the union could hardly complain, though presumably expecting it to in fact. What is more, the trust was validated by reliance on the relief of poverty exception from public benefit, an anomaly which is open to review by the House of Lords and Privy Council (see *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.* [1951] A.C. 292, at pp. 308, 312, 313 and *Re Cox* [1955] A.C. 627, at p. 637) and for which a strong Privy Council has recently evidenced a lack of enthusiasm (see *Abdul Caffoor Trustees* v. *Commissioners of Income Tax, Colombo* [1961] 2 W.L.R. 794; *ante*, p. 356).

## 4. *WILLS*

*Re Tetsall, decd.* [1961] 1 W.L.R. 938; [1961] 2 All E.R. 801 (Ch.D.)

*Specific legacy of shares—prior bonus issue overlooked by testatrix—extrinsic evidence—misdescription—uncertainty.*—Chronologically: in 1941 the testatrix became beneficially entitled to 750 ordinary shares in a particular company; in 1947, by a first will, she bequeathed "my 750 ordinary shares" in the company to her nephew Ernest; in 1951 the company made a bonus issue, fully paid, of nine for one, so that the testatrix was then beneficially entitled to a total of 7,500 ordinary shares; in 1952 by a second will and again in 1954 by her last will, the one under consideration, the testatrix repeated the bequest to Ernest in identical terms (*i.e.*, still 750 not 7,500); and in 1958 the testatrix died beneficially entitled to the 7,500 shares. The question on the summons was what if anything did Ernest get.

Cross J. first stated that he was without doubt entitled to know how the testatrix acquired the 7,500 shares and then held, despite a submission to the contrary, that he was also entitled to look at the 1947 and 1952 wills since this was a case of misdescription so that

any such evidence was admissible to show " that the testatrix on other occasions used the words in question to designate some person or object to which they do not properly refer " ([1961] 1 W.L.R. 938, at p. 940; [1961] 2 All E.R. 801, at p. 802; applying *Re Ofner* [1909] 1 Ch. 60 (C.A.)). Having looked at these two earlier wills, however, he found that the testatrix had misdescribed not the 7,500 shares, but only the original 750 shares. In other words, he was unable to say that the words used by the testatrix, construed in the light of the admissible evidence, passed the whole 7,500 shares to Ernest, despite his being satisfied that, had the testatrix's attention been drawn to the position, this is what she would have wished. Thus we have yet another regrettable reminder of the distinction between actual and expressed intention. The learned judge was helped to his decision by considering the position had the 1947 will remained the testatrix's last, saying that then " I do not see how it could have been argued that the whole 7,500 shares passed under the gift " ([1961] 1 W.L.R. 938, at p. 941; [1961] 2 All E.R. 801, at p. 803; citing *Re O'Brien* (1946) 175 L.T. 406). But this brings us back to the dubious distinction made by Roxburgh J. in the *O'Brien* case (conflicting with uncited *obiter dicta* of Eve J. in *Re Jameson* [1908] 2 Ch. 111, at p. 116) between a bonus issue and the subdivision (or indeed reconstruction or amalgamation) of a shareholding, the latter being carried by the gift (see *Re Kuypers* [1925] Ch. 244). The distinction is dubious since in substance the holding remains the same, certainly in value, whether multiplied or divided. Lastly, Cross J. followed *Re Cheadle* [1900] 2 Ch. 620, and held that despite the specific " my," the bequest did not completely fail for uncertainty, Ernest being entitled to 750 out of the 7,500 shares (now one-tenth of their original value).

The practical moral of this decision is to remember, when taking instructions for the drawing of a will containing specific legacies of shares, that a minor but unfortunate by-product of inflation may be both bonus issues and the defeat of the testator's actual intention. Then draft according to instructions.

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## 5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

*Rutherford* v. *Maurer* [1961] 3 W.L.R. 5; [1961] 2 All E.R. 775 (C.A.)

*Agricultural Holdings Act*, 1948—*" agricultural holding "—agricultural land used for the purposes of a trade or business—meaning of " trade or business "—agreement to let for grazing for six-months periods—whether land let for grazing " during some specified period of the year."*—This case raised points of construction on section 1 (2) and on the proviso to section 2 (1) of the Agricultural Holdings Act, 1948. The expression " agricultural holding " means, of course, for

the purposes of the Act "the aggregate of the agricultural land comprised in a contract of tenancy" (s. 1 (1)): and section 1 (2) of the Act provides that for the purposes of sections 1 and 2 the expression "agricultural land" means "land used for agriculture which is so used for the purposes of a trade or business. . . ." Section 2 (1) provides, as is well known, that when land is let for use as agricultural land for an interest less than a tenancy from year to year or a licence is granted to occupy land for use as agricultural land, then, in the majority of cases, the agreement shall take effect as if it were an agreement for the letting of the land for a tenancy from year to year: but this subsection concludes with a proviso that section 2 (1) shall not apply to a letting or the granting of a licence "made . . . in contemplation of the use of the land only for grazing or mowing during some specified period of the year."

The Court of Appeal held in this case that the expression "trade or business" in section 1 (2) is not limited to trades or businesses which can be described as agricultural or concerned with agricultural produce. The land in question was a field belonging to the plaintiffs which was used by the defendant, the proprietor of a riding school, as grazing land for some of the horses used in connection with the riding school. Land used as grazing land is clearly "land used for agriculture" as defined by section 94 (1) of the Act: and the conduct of a riding school is a trade or business. The field was, therefore, "agricultural land" within the meaning of section 1 (2) of the Act.

But the agreement under which the defendant was allowed to use the field stated that the field had been let to the defendant for grazing "for six-months periods": and it was argued from this that the agreement had been saved by the proviso to section 2 (1) from being deemed to be a letting for a tenancy from year to year (and therefore a "contract of tenancy" within the meaning of the Act), since it merely contemplated the use of the land for grazing for a "specified period of the year." It was held, however, that since the agreement mentioned "periods" in the plural, it could not last for less than two six-months periods, so that it must have been intended to continue for at least one full year. The proviso to section 2 (1), therefore, did not apply.

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*Re Aspinall, decd.* [1961] 3 W.L.R. 235; [1961] 2 All E.R. 751 (Ch.D.)

*Rent—moment when payable—accrual of cause of action for rent—rent payable in advance on quarter day—rent payable in arrears on quarter day—death of landlord on quarter day—whether rent capital or income—apportionment.*—The owner of certain leasehold premises, who had granted subleases of different parts of the premises to different persons, died in the morning of December 25, 1954, having by his will directed his executor and trustee to hold his residuary estate (into which these premises fell) on trust to pay the income to his wife for life and after her death on trust for his son by a previous marriage absolutely. Some of the rents due under these

sub-leases were payable in advance on the usual quarter days: others were payable in arrears on the usual quarter days: and in one case rent payable in advance to the testator on November 22, 1954, had been paid to him before he died. The question was whether these rents ought to be treated wholly as capital or wholly as income of the estate or partly as capital and partly as income and, if so, in what proportions.

Buckley J. held that the answer to that question depended upon whether a cause of action to recover the rent in each case had accrued before or after the death of the testator. If that cause of action had accrued before the death, then it formed an asset of the testator's estate at the time of his death, and the fruits of that asset formed part of the capital of the estate: but if it did not accrue till after the death, then the proceeds formed part of the income. After an interesting review of some eighteenth and early nineteenth century cases dealing with leases granted by tenants for life, some of whom did and some of whom did not have express powers of granting leases under the terms of their respective settlements, he went on to hold that rent is not completely due until the end of the day fixed for payment, if the term continues until the end of that day; so that upon the facts of the present case, no right of action accrued in respect of the rents due on December 25, 1954 (whether in advance or in arrear) until after the testator's death. An argument of counsel for the testator's son to the effect that (1) rent was due from the earliest moment of that day and (2) the testator must be taken to have lived throughout that day, since the law takes no account of fractions of a day, so that (3) the rents due on that day belonged to the testator for twenty-four hours before his death was rejected.

Subject to the Apportionment Act, 1870, therefore, the rents due on the day of the testator's death fell to be treated as income of his estate. But under the provisions of that Act one day's rent of the rents payable in advance and all but one day's rent of the rents payable in arrear fell to be treated as having accrued in the testator's lifetime, *i.e.*, as capital of the estate. But the Apportionment Act has been held not to apply to payments which fall due before an event which would otherwise give rise to an apportionment. The rent payable to the testator in advance on November 22, 1954, and paid to him before his death was held to be wholly capital.

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*Weg Motors, Ltd.* v. *Hales and others* [1961] 3 W.L.R. 558; [1961] 3 All E.R. 181 (C.A.)

*Option to take further lease—lease for twenty-one years—option in separate written agreement made in consideration of lease—option for renewal of lease or for granting of new lease — validity of option—whether running with reversion—property subject to mortgage at time of lease and option—whether lessor had power to bind reversionary estate—Law of Property Act,* 1925, *ss.* 142, 149 (3).—The

decision of Danckwerts J. in this case (noted at p. 166, *ante*, where the facts are set out in some detail) has been affirmed by the Court of Appeal.

The main question in the case related to the validity of an option to take a further lease contained in an agreement in writing but not under seal and given in consideration of the plaintiff company (the tenants) "taking a lease of even date with but executed after these presents." This option was stated to be exercisable more than twenty-one years after the date of the agreement, and it was argued that the option was void either (a) because the rule against perpetuities had been infringed or (b) because the agreement creating the option was a contract to create a term limited to take effect more than twenty-one years from the date of the instrument purporting to create it (see Law of Property Act, 1925, s. 149 (3)). In connection with the former point the court was also called upon to consider whether this option ran with the reversion under the Law of Property Act, 1925, s. 142.

Upon the perpetuity point the Court of Appeal agreed with Danckwerts J. that as a matter of construction the option agreement and the lease formed part of one single transaction, and that the option amounted to an option to renew the lease, which, despite certain differences in the descriptions of the parties in each document, could only be exercised for so long as the parties or their respective assignees continued to be landlord and tenant. The option document by itself, in their view, amounted to no more than an offer which could have no binding effect until it was accepted by the execution of the lease, so that no binding agreement for an option came into existence until the relationship of landlord and tenant had already been created. The execution of the two documents, therefore, quite clearly formed part of the same transaction, *i.e.*, the grant of a lease coupled with an option to renew it.

But had the rule against perpetuities been infringed? Options to renew leases have long been held to be exceptions to this rule. But in *Muller* v. *Trafford* [1901] 1 Ch. 54, 61, Farwell J. expressed the view that the reason for the exception is that covenants for the renewal of leases are covenants which run with the land and are annexed to the land from their inception, so that no question of perpetuity can arise: and it was argued from this (1) that the exception only applies where the option is a covenant the burden of which runs with the reversion under what is now section 142 of the Law of Property Act, 1925, and (2) that the option in the present case did not so run. Upon this point the Court of Appeal held that the option in this case did run with the reversion under section 142, so that it was unnecessary, in their view, to consider what the position would have been, if it had not done so. They agreed with Danckwerts J. that a "covenant" for the purposes of section 142 need not be under seal: they held also that provided that a covenant by a lessor has "reference to the subject-matter of the lease" (as the option in this case did) and provided also that the relationship of lessor and lessee exists at the time when the covenant is created, there is no reason why that covenant should not be contained in an independent document, since section 142, which deals with the burden of these covenants (unlike section 141 which deals with the benefit) does not expressly require

that the covenant should be contained in the lease: they held, further, for the same reasons as those given by Danckwerts J. (see p. 168, *ante*) that the fact that the fee simple estate had been mortgaged by legal charge at the time when the option was created did not deprive the original lessors of "power to bind the reversionary estate."

With regard to section 149 (3) of the Law of Property Act, 1925, the court held unanimously that this section did not apply in the present case, since even after the acceptance of the offer to grant the option by the execution of the lease there was still no "contract to create a term" within the meaning of the section. They expressly refrained from casting any doubt on the correctness of the decision of Buckley J. in *Re Strand and Savoy Properties, Ltd.* [1960] Ch. 382 (upon which reliance had been placed in the court below) with regard to the interpretation of section 149 (3). The contract in the present case, however, amounted to no more than an option, which might never have been exercised, and which could not in itself be said to be a contract to create a term of years at all.

Leave to appeal to the House of Lords was granted.

# THE LIBRARY

*Lands Tribunal, Practice and Procedure and Guide to Costs.* Current Law Practice Guide. By R. F. C. Roach, o.b.e. Sweet & Maxwell, Ltd. 1961. 199 pp. (£1 5s.)

During the past ten years the Lands Tribunal has become a remarkable feature of our legal structure, poised as it is between the courts and the tribunals. "The Lands Tribunal as constituted is an independent judicial body having a formal code of procedure yet permitting an informal atmosphere in the conduct of proceedings before it." (Preface.) The discharge of restrictive covenants, the granting of certificates under the Rights of Light Act, 1959, hearing appeals from local valuation courts, and assessment of compensation, all come before the Lands Tribunal, which has given general satisfaction, and the Franks Committee recommended additional work for it.

This work contains a clear, accurate account of the working of the Lands Tribunal Rules, with chapters on particular aspects of those rules, a complete guide to High Court and county court costs, and all the relevant statutory provisions and rules in the Appendix. Although it is designed as a work of reference it combines readability with excellent classification. A general chapter drawing attention to differences from ordinary court procedure might have been useful for the solicitor who has not much experience of Lands Tribunal work. For example, a party may be represented by a non-lawyer friend or adviser with leave; only one expert witness is permitted without leave; cases can be consolidated even without application by the parties; and there is no official shorthand writer present at the hearing.

In *Wexler* v. *Playle* [1960] 1 Q.B. 217, C.A., which is adequately cited in the index but not the footnote, a frequent failing, Morris L.J. said that the Lands Tribunal has a discretion to admit further evidence after the close of the hearing, *e.g.*, if there had been an inadvertent error in a figure or in some evidence, but was justified in refusing to hear evidence which could have been given at the time of the hearing. The paragraph at page 55 is misleading.

In the matter of appeals under the Lands Tribunal Act, 1949, s. 3 (4), and R.S.C., Ord. 58A (not 53A, p. 73), no reference is made to *Routh's Trustees* v. *Central Land Board* [1960] 1 W.L.R. 737; [1960] 2 All E.R. 436, C.A., in which Lord Evershed M.R. carefully explained and illustrated the limits upon the Court of Appeal to questions of law and not fact (p. 740 and p. 438 respectively) and stated categorically that the calling of additional evidence cannot be permitted in the Court of Appeal in such cases (p. 744 and pp. 441–442 respectively).

It is true that a work on practice and procedure is not the place for detailed exposition of substantive law, but a background sketch is often necessary to give practical reality. For example, Chapter 7 deals with applications under the Rights of Light Act, 1959, s. 2, for a certificate that due notice has been given to those likely to be affected or that because of exceptional urgency a temporary notice should be registered forthwith, but there is no mention of the purpose of the certificate, which is to register a notice as a local land charge so as to prevent time running in favour of a potentially dominant tenement, nor of the fact that the notice remains effective for one year; and a reference to the Registers of Local Land Charges (Rights of Light, etc.) Rules, 1959 (S.I. 1959, No. 1733) might have been helpful in this context. Quick sketches and references such as these often serve as a useful jog to the memory of a busy practitioner.

We are given no reference to Preston and Newsom's *Restrictive Covenants Affecting Freehold Land* (3rd ed., 1960) in which the Planning and Compensation Reports are analysed. There cannot now be any doubt (p. 4) of the Lands Tribunals' power to determine matters of title—"But where it is necessary that a question on enforceability or title, or indeed any other point of law, shall be decided for the proper determination of the case, the Lands Tribunal can, and indeed must, determine that question" (Preston and Newsom, p. 191, citing *Spruit's Case* (1957) 9 P. & C.R. 24, C.A.). We are supplied with no details of the very exceptional case in which compensation was awarded to the objectors, nor the evidence that was required. Is it sensible to go before the Lands Tribunal without having even referred to the judgment of Lord Evershed M.R. in *Re Ghey and Galton's Application* [1957] 2 Q.B. 650, C.A., in which the function of the Tribunal and the nature of the matters of which it must be satisfied on the evidence were discussed at length? The entire work is deficient in dealing with the relevant matters of evidence, which is surely an integral part of practice and procedure. What do we need to prove before the Lands Tribunal and how do we do it?

This book needs more background information, more attention to matters of evidence and more references, particularly to case citations in the official reports and the Planning and Compensation Reports, but it will be very handy for those involved in Lands Tribunal work. It is attractively produced in a glossy soft cover.

A. S.

*R. E. Megarry's The Rent Acts.* 9th ed. By Ashley Bramall, M.A., Barrister-at-Law. Sweet & Maxwell, Ltd. 1961. lxxxviii and 897 pp. (£5 5s.)

It is a little sad to think that Megarry's personal responsibility for *Megarry* has perhaps ended. In the preface to the eighth edition, which was brought out by Ashley Bramall and P. V. Baker, Megarry's other commitments having then restricted him to doing "little more than shout encouragement and advice from the touchlines," he expressed the hope that if a ninth edition were called for he would be "able once again to take up the reins myself." Alas, it was not to be! He has "perforce played an even smaller part in producing it than ever before." Ashley Bramall is almost entirely responsible for the new work which has gone into the ninth edition. He deserves congratulation on the successful completion of a formidable undertaking. It is no reflection on him or any other editor to say that *Megarry* can never be quite the same again. To the faithful, familiar with all editions from the first, *Megarry* had become not only a work of learning but a work of art. In its elegant economy of language, irradiated with flashes of wit, in its sure grasp of principle, in its deft handling of multitudinous authorities, *Megarry* has been in a class by itself.

Having allowed ourselves that moment of nostalgia, let us be grateful that after six years (the longest interval since the one between the first and second editions) there is at last a new *Megarry* to embody the legislation and case law of the intervening period. A great deal has happened in these six years, particularly the important changes brought about by the Rent Act, 1957, and Ashley Bramall has most skilfully woven the new material into the old.

In a book of this size there are bound to be points which individual readers and reviewers may wish to raise. The present reviewer would like to make the following few comments for consideration.

The note on *Estates Gazette* reports (pp. lxxi–lxxii) requires revision as such reports have now for some time been edited by a member of the Bar. The words "in connection with mortgages" inserted in paragraph 4 on p. 111 are a little cryptic; some more explanation here would be useful. There is still

an inconsistency, not really resolved by footnotes 62 and 77, between the statement as to the effect of a progressive rent at the foot of p. 112 and at the foot of p. 113, respectively; incidentally footnote 77 is wrong in referring to "*ante*, p. 116." The opinion ventured, albeit "with considerable diffidence," on p. 116 that the definition of "long tenancy" does not cover tenancies which are for a term of more than twenty-one years terminable at an earlier date is difficult to maintain in the face of the definition of a "notice to quit" in section 69 (1) of the Landlord and Tenant Act, 1954, which assumes that "a tenancy for a term of years certain" may be terminated before it has run its full course without impairing its integrity as a "tenancy for a term of years certain." The statement on p. 138 that the importance of the distinction between old and new control has "very largely" disappeared is somewhat imprecise; a more definite statement appears on p. 86. One would have expected a reference in the course of pp. 144–151 to decontrol by the creation of a new tenancy coming into operation after July 6, 1957. It is true that this is dealt with on pp. 116–121, but it seems necessary to include it for completeness in dealing with the decontrolling effect of the Act of 1957. Surely section 17 of the Act of 1957 must override *pro tanto* the restriction contained in section 15 (2) of the Act of 1920; it seems an odd construction to say, as is said on p. 202, that the latter provision "appears to render impossible" the exchanges envisaged by the former. The reference in footnote 79 on p. 264 to section 25 (1) (*c*), (*d*) of the Agricultural Holdings Act, 1948, should now be a reference to section 25 (1) (*d*) only (as a result of an amendment made by the Agriculture Act, 1958). The sentence "these provisions will now be considered" in the second paragraph on p. 375 seems to be left over from some earlier edition; it is no longer quite intelligible in the present context. The four classes of transactions listed on p. 398 as being prohibited by the premium provisions of the 1957 Act are puzzling. Numbers (i) and (ii) appear to relate to premises which remain within the revised rateable value limits for control and which still, therefore, attract the permanent prohibition of premiums. With great respect, has something gone wrong in this tabulation? The suggestion on p. 433 that a three-year tenancy, agreed to by the landlord and tenant, was effective to determine the transitional protection without the service of Form "S" is perhaps more controversial than it sounds, but the matter is now largely academic.

The new *Megarry* is, of course, a "must" for every property lawyer and, indeed, for all who are concerned with tenanted residential property in a professional, business, or, if they have the intellectual urge, personal capacity.

J. M. W.